

In the matter of Petition for Independent Review between Judith A. Rost, Petitioner, and Alexandria Housing and Redevelopment Authority, Respondent

OPINION AND AWARD

BMS Case No. 04-PIR-1363

PETITION FOR INDEPENDENT REVIEW

INDEPENDENT HEARING OFFICER

Joseph L. Daly

APPEARANCES

On behalf of Judith A. Rost
Richard T. Wylie, Esq.
Minneapolis, MN

On behalf of Alexandria Housing and Redevelopment Authority
Patricia Y. Beety, Esq.
League of Minnesota Cities
St. Paul, MN

JURISDICTION

In accordance with Minn. Stat. § 179A.25 and per *Alexandria Housing and Redevelopment Authority v. Bureau of Mediation Services, et al*, 2006 WL 2865496 Minn. App. (Oct. 10, 2006) (# A06-75), review denied (Dec. 12, 2006) unpublished, the above independent review was submitted to Joseph L. Daly, Independent Hearing Officer, on June 6, 2007 in Alexandria, Minnesota.

Post-Hearing Briefs were filed by the parties on July 6 (Petitioner) and July 7 (Alexandria HRA) respectively. The decision was rendered by the independent hearing officer on July 23, 2007.

ISSUES AT IMPASSE

Based on the presentations of the parties, exhibits and post-hearing briefs, the issues are:

1. Does the independent hearing officer have jurisdiction pursuant to Minn. § 179A.25?
2. Did the Alexandria Housing and Redevelopment Authority terminate Ms. Judith Rost in a manner consistent with its policies, procedures and other relevant laws? If not, what is the appropriate remedy?

The potentially relevant law is:

Minn. Stat. § 179A.25

It is the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment. When such review is not provided under statutory, charter, or ordinance provisions for a civil service or merit system, the governmental agency may provide for such review consistent with the provisions of law or charter. If not other procedure exists for the independent review of such grievances, the employee may present the grievance to the commission under procedures established by the commissioner.

The potentially relevant policy is:

Alexandria Housing and Redevelopment Authority Employment and Personnel Policies

BASIC PRINCIPALS:

The employment of personnel and all actions affecting the employees of the Alexandria Housing and Redevelopment Authority shall be based solely on merit, ability and justice. There shall be no discrimination against employees or applicants for employment based on race, color, religion, sex of household head, national origin, marital status, handicap, age, receipt of public assistance, political or union affiliation. Federal Statute 5 U.S.C. 1501 restricts the political activities of any Public Housing Authority officers and its employees if their principal employment is in connection with an activity financed in whole or in part by Federal funds. The U.S. Merit Systems Protection Board enforces these restrictions.

EMPLOYEE CLASSIFICATIONS:

There shall be two (2) classifications of employees with the Alexandria Housing and Redevelopment Authority – administrative and maintenance. Positions within the Authority shall consist of an Executive Director, Public Housing Coordinator, Administrative Assistant (Housing Specialist), Head Maintenance Worker and a Maintenance Helper. Part-time employees shall consist of Tenant Coordinator and Administrative Assistant/Bookkeeper.

The Executive Director may make recommendation of changes in staffing patterns as deemed necessary to meet the needs of the Alexandria Housing and Redevelopment Authority.

HIRING PROCESS:

The Alexandria Housing and Redevelopment Authority, being an equal opportunity employer, shall hire individuals solely upon the basis of their qualifications for the position for which they apply. Notice of vacancies shall clearly state qualification standards for the position. When positions open within the Authority, qualified candidates from within the organization shall fill those job openings, should the employee desire the position. At a minimum, notices of job openings shall be posted within the management office of the Authority and advertised in the local newspaper. All advertisements for recruitment of employees shall include the statement “An Equal Opportunity Employer”. The Authority shall accept applications for employment only for positions that are currently open. The Authority shall not pay any employment agency fees for unsolicited referrals of individuals to fill openings.

The Alexandria Housing and Redevelopment Authority shall not conduct or seek to make an inquiry as to whether an applicant is disabled nor the nature or severity of the disability. The only exception to this mandate is that the Authority may require applicants for employment to take a pre-employment physical examination. A pre-employment physical examination may be required for specific jobs provided that ALL entering employees in that job classification take such an examination regardless of whether or not they had handicapped. Normally, this is only done for Maintenance personnel or individuals whose duties require physical exertion. The scope of the medical examination shall be limited to the physical requirements of the position.

All information obtained with respect to pre-employment physical examinations shall be kept confidential. Expenses for pre-employment physical examinations are an allowable cost to the Alexandria HRA’s operating budget.

Employees will also be subject to a criminal background check especially if they will have access to master keys in the building.

The Alexandria Housing and Redevelopment Authority shall consider all employees to be “employed at will”. There shall be no employment contracts with any employee.

Separation from Employment:

Should an employee resign for his/her employment, the employee shall submit a written resignation at least two (2) weeks in advance, setting forth his/her reason(s) for resigning. A Written report of the exit interview with the employee shall be placed in the permanent employee’s personnel file. On the last working day of the employee, the employee shall be required to return all property belonging to the Alexandria Housing and Redevelopment Authority assigned to him/her. These items may include, but are not limited to agency vehicle keys, tools, property keys, the Policy Manual and Personnel Handbook, etc.

An employee who gives unsatisfactory service or who is guilty of substantial violation of regulations shall be subject to dismissal without notice. In such cases the employee, if he/she desires, shall be given a hearing before the Board of Commissioners.

Any disciplinary action imposed on an employee shall be done in a manner that will not embarrass the employee before other employees or the public.

Oral Discipline:

- Explain to the employee the nature of the violation and the behavior or results you now expect.
- Explain to the employee the consequences of a repeat violation or continuing inappropriate behavior.
- Make a record of the conversation for future reference. This record will then be placed in the personnel file of record.
- Write down the response of the employee.
- Explain the grievance procedure.

Written Discipline:

- Construct a written warning to the employee containing reference to the nature of the violation, the previous oral warning, if applicable, the consequences of a repeat violation or continuing inappropriate behavior.
- Make a record of the written warning for future reference. This record should then be placed in the personnel file of record.
- Write down the response of the employee.
- Obtain the written signature at the bottom of a copy of the written warning acknowledging that he/she has received the original copy of the written warning. Explain to the employee that the signature does not imply that they are in agreement with the letter, only that they have received the letter.
- Explain the grievance procedure.

Should it be necessary to reduce personnel, the selection of employees to be retained shall be based primarily on their relative efficiency and the necessity of the job entailed. Other things being equal, length of service shall be given consideration.

[Employer Exhibit No. 1, emphasis in original]

FINDINGS OF FACT

1. Ms. Judith A. Rost, the Executive Director of the Alexandria Housing and Redevelopment Authority since March 2001, was the subject of a special meeting of the Board of Commissioners of the Alexandria Housing and Redevelopment Authority on March 12, 2004. The minutes of the meeting state in their entirety:

Minutes of Special Meeting of

Alexandria Housing and Redevelopment Authority Board of Commissioners

March 12, 2004

A special meeting of the Board of Commissioners of the Alexandria Housing and Redevelopment Authority was called by the chair at 5:00 p.m. on March 12, 2004. The meeting was attended by the Chair Colleen Thompson and members Benson, Bigger, Larsen, and Tischer, all members having been notified by telephone of the meeting.

The meeting was called to order by Chair Colleen Thompson, who advised the board that the purpose of the meeting was for the Board to consider the receipt of a notice made by a co-employee of alleged misconduct on the part of the Director Judith Rost. The Chair advised that an employee had reported the misconduct to a board member, and that the board member had reported an incident to her. The incident occurred when the Director was involved with inventorying personal property of a deceased resident. The allegations reported by the employee were that during the inventory process of the deceased residents property the Director and the employee discovered a prescription medication, Zoloft, which had 27 pills remaining in the container. The Director announced to the co-employee that she used the Zoloft herself, and that rather than flushing them away, she was going to keep the Zoloft and use them herself because of the high cost of the prescription medication.

The Chair further advised that she had provided an appropriate Tennyson warning to the Director Judith Rost before interviewing her about the incident early that day. Based upon the information secured from Judith Rost, the Chair confirmed that Judith Rost had misappropriated and kept the 27 Zoloft tablets for her own use. The Chair concluded it important to call a special meeting of the commissioners to advise them of the whistle blower report, of her investigation into the circumstances and to defer to the board for the board's decision and response to the whistle blower complaint. The Chair advised that there seemed to be no question in her mind that the report by the whistle blower was accurate, and that the Director had misappropriated the Zoloft pills for her own use. Based upon the data reported, the Chair advised that she had informed the Director that she was calling a special meeting, and had advised the Director that she could appear in front of the board and present her version of the facts.

Judith Rost appeared before the board and responded to questions from the various commissioners related to the allegations made by the whistle blower employee. Judith Rost admitted taking possession of the Zoloft and keeping them herself because she used the same prescription, and the tablets were going to be destroyed anyway so she decided to keep them and intended to use them. Judith Rost advised that she didn't think that there was anything wrong with keeping the prescription medication because she told a co-employee of her intentions. She pointed out that she was forthright and honest with the disclosures about her intentions concerning the Zoloft tablets by disclosing the circumstances to the co-employee. She advised the board that she didn't think her retention of the Zoloft prescription medication was a problem with her retention of the 27 tablets because the medication would have ultimately been destroyed anyway by flushing it down the toilet.

The board members discussed various issues with Judith Rost in her presence. After discussions with the board members, Judith Rost left the room, and the board members discussed their reaction to the reported incident.

After Judith Rost left the room the board members discussed in detail the response from the Director and what the boards reaction to the reported incident should be. The board members expressed concern that their Director was the one who should be setting the example for other employees and as a consequence, because other employees were aware of the inappropriate retention the credibility of the Director was reduced, and that leadership abilities were in fact challenged. The board members concluded that Judith Rost did misappropriate prescription drugs, did intent to put them to her own personal use, and that other employees were aware of the incident. After a thorough and complete discussion of the proposed response by the board, Board Chair Colleen Thompson moved that the board ask for Judith Rost's resignation, and if Judith Rost did not resign that she be advised of the board's intent to terminate her employment for cause. The motion was seconded by Board member Bigger. After additional discussion the question was called and board members Bigger, Thompson, Benson and Tischer voted in favor of the motion. Board member Larsen voted against the motion.

The board then discussed publicity issues, including the negative influence of potential hostile work environment for other employees as a result of the incident. The board concluded that the board needed to ask a director for her keys and computer password as a condition of their request to the Director seeking her resignation.

Judith Rost then reappeared at the meeting and was advised by the Chair of the boards action to request her resignation in lieu of termination. Director Judith Rost requested time to consult with her attorney and time to talk to her husband about the request. The Chair advised that the board had decided to ask for the resignation and that is was unlikely that the board was willing to change it's mind. The Director further advised that as Director of the HRA, the Board has a higher expected standard of performance than for other employees, and accordingly the Board's decision to request the resignation.

The Chairman asked the Director to turn over her keys, and to establish a time for the Director to clean out her office in the presence of other members of the Board or employees of the HRA.

After Judith Rost left the meeting the Board members discussed the appointment of an interim. After further discussion on the interim director issue without any specific action, the meeting was adjourned.

Walter Tischer, Secretary

Colleen Thompson, Chairperson

2. Ms. Rost prepared a resignation letter dated March 15, 2004, [Employer Exhibit No. 6]; however, she did not deliver it. Instead, on March 17, 2004 she requested reconsideration by the Board, which it denied. The Minutes of the Board's March 17, 2004 Special Meeting state in their entirety:

Minutes of Special Meeting of

Alexandria Housing & Redevelopment Authority Board of Commissioners

March 17, 2004

The Board Chair called the meeting to order. The Chair announced that the purpose for the meeting was to consider a written request received from Director Judith Rost that the Board reconsider its action, and provide her with an opportunity to discuss reinstatement with the Board. All members had been provided with a copy of a letter dated March 16, 2004 addressed to the HRA Board of Commissioners, and which had been personally delivered to the homes of each of the directors.

Counsel to the board advised of the need for the board to go into closed session to discuss personnel matters. Board member Bigger moved to close the meeting for the purposes of discussing personnel matters and discussing potential employee discipline with counsel to the Authority. The motion was seconded by commissioner Benson and unanimously carried.

The Chair advised that the purpose for the meeting was to consider Judith Rost's request for reconsideration. The board discussed in detail the letter from Rost. Counsel to the authority advised that the appeal by Judith Rost constituted an appeal under their grievance procedure, and advised that a hearing had been provided by the Board of Commissioners on Friday, March 12, and that the discretion of the board was not compelled, but if they choose to, could elect to give Judith Rost a chance to appear and request reconsideration by the board.

The Board reviewed the circumstances related in the whistle blower report, the investigation and the undisputed fact that Director Judith Rost had retained personal possession Zoloft with the intention to use the Zoloft herself because of the expense of the prescription. The Board specifically reviewed the credibility of the whistle blower employee who made the report and concluded that there was no question of the credibility of the whistle blower. The Board further discussed the fact that their discipline and request for resignation was a result of misappropriation and mishandling of another's property i.e. the prescription Zoloft. The board discussed with counsel to the HRA varying methods of proceeding in response to the request by the Director.

After considerable discussion by members of the board, member Tischer moved to deny the request for the reconsideration made by Director Judith Rost, and deny the opportunity to reconsider and permit Judith Rost to address the board. Board member Thompson seconded the motion. The motion carried on the affirmative votes of Benson, Tischer and Thompson Members Bigger and Larsen voted against the motion.

The board then discussed the issue interim director, and Commissioner Benson moved that Kathy Glaesman be appointed as interim director pending the appointment of a successor director. The motion was seconded by commissioner member Tischer and carried unanimously.

Counsel to the authority advised that it was necessary to complete action by the board to approve the minutes of March 12 and March 17 before commencing the hiring process. The board directed counsel to the corporation to have the tape-recorded discussion of the meetings transcribed, so that precise minutes could be prepared. The Board directed counsel to the HRA to secure a typewritten transcript of the meetings of March 12 and March 17.

The Chair advised the members of the board that she had been informed by Director Judith Rost on that morning that if the board did not grant her request for reconsideration, and request for a hearing before the board Judith Rost has indicated she will resign her position.

Commissioner Bigger moved to adjourn the closed meeting Commissioner Benson seconded the motion and which carried unanimously.

There was no further business come before the Board although the Board did discuss a number of peripheral issues with counsel to the HRA including questions raised by the Board's prior action to employ a city council member as a part time employee, and the criminal history disclosure received on a potential maintenance worker. The chair requested that counsel to the HRA review the action taken by the Board and provide the Board with an opinion concerning both issues.

There being no further business to come before the board, the meeting was adjourned.

Walter Tischer, Secretary

Colleen Thompson, Chairperson

[Employer Exhibit No. 7]

Ms. Rost gave the resignation letter to Ms. Colleen Thompson, Chair of the Board, on or about March 20, 2004, the weekend she cleaned out her desk.

3. The “resignation/termination” was precipitated by an event which occurred on Friday, March 5, 2004. At about 3:30 p.m., a maintenance person came into the office with a box of material which had been abandoned by a resident of one of the apartments which was administered by the Alexandria Housing and Redevelopment Authority. The box had some prescription medication in it. Ms. Rost called Nancy Scholl at Vikingland Health Home, the agency which had been administering the healthcare needs of the resident who had been moved out of the Alexandria Housing and Redevelopment Authority apartment. The resident had moved into a long-term nursing care facility and was no longer under the jurisdiction of the Vikingland Health Home agency. Ms. Scholl told Ms. Rost to “document the prescriptions and put it in the file”, then “flush the prescriptions down the toilet”. Ms. Rost told her assistant what needed to be done and then had the box put in an office next to hers. Ms. Rost then proceeded to inventory the pills along with her assistant. She told her assistant it was “a shame we have to get rid of all this”. There was a diabetic testing kit, hoses for oxygen and the pills. Ms. Rost testified they came across a prescription called Zoloft, a prescription for depression. Ms. Rost counted the pills and told her assistant it was “a shame we have to flush the prescription” since “it is the same medication I take”. Ms. Rost testified Zoloft is “quite expensive” and that she had recently purchased a bottle of the exact prescription medication and dosage at Target. She wondered aloud if she “should take these home and use them”. Ms. Rost testified that she said to herself, she “needed to check and see if she could do this or not”. At that moment, according to Ms. Rost, an elderly gentleman came into the office and needed something. She visited with the man for awhile; then a younger man came in to talk with her. Ms. Rost testified she put the pills in her pocket. At that time, her assistant and the younger man went outside to smoke a cigarette. Ms. Rost went back to her office. Her assistant left at about 4:30 that afternoon. Ms. Rost decided to leave at about 5:15. At that point, she remembered the pills in her pocket, took them out and put them in a sandwich bag and put them on the desk in the other office. They remained on that desk until March 12, 2004.

4. The following week, March 8-11, 2004, Ms. Rost attended a conference in Minneapolis. She drove to Minneapolis. She forgot to bring her own prescription medication [Zoloft] with her, and as a consequence, did not take any of the Zoloft medication while she attended the conference.

5. On March 12, 2004, the day after Ms. Rost returned from the conference, Colleen Thompson, Chair of the Board, notified her of a Special Board Meeting to be held that afternoon “concerning the pills Ms. Rost had taken”. At the Special Board meeting on March 12, 2004, Ms. Rost brought the pills in the sandwich bag from the desk with her. At the meeting she was handed a letter which had been written by an employee and given to the Board. The letter stated in full:

Friday, March 5th - Monday, March 8th 2004

Carol Persson has been gone from the VT for a month or so, we brought her belongings to the Twin Cities on Tuesday March 2nd when we attended a workshop on Rental Rehab. Early this afternoon, maintenance started cleaning out her apartment.

Judi inquired about non perishable food items in Carol’s apartment. She asked maintenance to bring them to the office so that she could take them to the food shelf. 3 or 4 large boxes were brought up, and she asked the maintenance personnel to put them in the back of the truck so she could take them to the food shelf. I did mention that Vikingland Home health had purchased many items for Carol, and suggested we call them to see if they had any other clients that might need something.

A little later, Darrell, the maintenance helper, brought a rather large box into the office. He said they were meds from Carol’s apartment, and he could not keep them in the maintenance room because of the presence of STS workers. I mentioned to Judi that we could take them to Pope Douglas Incinerator to be destroyed because I know they will do controlled burns of sensitive materials such as meds. In the meantime, I placed them on the floor of Cathie’s office for safekeeping.

Just a little while later, I noticed that Judi and David Wiener, the maintenance supervisor, were looking through the box, when she said, “we’re looking through Carol’s things to see if there’s anything we can have.” I really didn’t pay much attention, because frankly, I didn’t think there would be anything in there of any interest to anyone.

Close to the end of the day, around 3:45 P.M. or 4:00 P.M., I was alone in the office, except for Judi. Judi told me that she had spoken to Nancy Scholl, who is head of Vikingland Home Health. Carol had been a client of theirs before going to the nursing home. She told me that Nancy had advised her to contact the

respiratory company that supplied Carol's oxygen and tubing, and ask them if they wanted the tubing back. She also told me that Nancy had advised her that we should write the RX numbers of all the meds, and then we could dispose of them. I questioned how to dispose of the syringes and she said Nancy had told her we could discard them in our own containers.

Judi then said we would throw everything away, but that she was keeping the Zoloft, because "she takes that anyway". She brought the bottle over to where I was sitting working at my computer, and said something to the effect like, "do you know how much these are? I pay over 100 dollars for a bottle of these. How many do you think are in here?" She opened the bottle and shook them out into her hand, and counted out 26 pills. I turned the bottle in her hand and said there was at one time 30 of them in there, because the bottle notes that. She then said she paid over 100 dollars for a bottle of 30, and wasn't that amazing? I assumed she meant the price, and also remarked how expensive drugs could be. She then put the pills in her pocket, and said she would put the bottle back into the box so that I could record the RX number. She also looked at a pill box marked MTWF and tried to get it open, saying there was Zoloft in there, too, but couldn't get it opened.

I asked David Wiener if she had made mention or showed interest in the bottle of Zoloft, and he said she had. He also remarked that the bottle was empty, and I told him that she had taken them.

On Monday, March 8th, I called Nancy Scholl of Vikingland Home Health, who told me that for the most part, what Judi told me she had advised was true, but said she definitely told her that two people should dispose of the meds. I was never told that by Judi. Nancy told me the conversations is documented. Nancy explained that since Carol went to a nursing home, she is no longer a client of either Vikingland Home Health, or of Douglas County Public Health, who as I understand it, serves as a "case worker" for people. Carol's caseworker was Patty Troy. I did not speak with her, as Nancy told me it was out of both agency's hands when Carol went to the nursing home. Apparently neither agency is required to take care of or responsibility for any of the client's belongings or meds once they are no longer on the program.

As of 4:30 P.M. Monday, March 8th, 2004, I have not recorded the Rx numbers or types, or disposed of anything in the box, and do not intend to without further advisement. As requested, I am sending this report to David Benson, after a brief conversation on Monday, March 8th, 2004.

RX#43766
Carol Persson
100 MG Zoloft #30
Dated: 1/22/04
Dr. Sia Su

(Name Deleted)

[Employer Exhibit No. 3, emphasis in original]

At the Special Meeting of March 12, 2004, Ms. Rost explained to the Board she had not used any of the pills. She told the Board that she openly discussed with her assistant the pills, their value and the fact that she took the same medication. She told the Board that if she wanted to “steal” the pills, she could have done so easily and secretly. She felt that the pills had been abandoned and would be disposed of anyway.

The Board decided that Ms. Rost had taken the pills and that she had someone else’s prescription medication. The Board knew that Zoloft is not a controlled substance. [Employer Exhibit No. 5 at 19 6-11]. The Board gave Ms. Rost the option to be “terminated or resign”.

There is no specific Alexandria Housing and Redevelopment Authority written regulation covering abandoned medication.

6. Colleen Thompson, the Chair of the Alexandria Housing and Redevelopment Authority Board, testified that the Board decided Ms. Rost had “lost her credibility and couldn’t be the Director”. [Testimony of Ms. Thompson at the Independent Hearing]. Ms. Thompson testified that after the vote by the Board on March 12, 2004, Ms. Rost was brought back into the room and told the Board would “ask for her resignation or she would be fired”. Ms. Thompson testified that Ms. Rost was “dismayed”. Ms. Thompson further testified that the Board felt there was a “substantial violation of regulations but there was no written down regulations, but there was a procedure”. [Testimony of Ms. Thompson at the Independent Hearing].

7. On March 17, 2004, at another Special Meeting, Ms. Rost asked to be reinstated. Ms. Thompson testified the Board held another closed meeting and felt it had done everything it needed to do and that Ms. Rost had been properly dismissed. Therefore the board was not willing to give Ms. Rost a new hearing. Ms. Thompson testified the “termination was warranted” and that Ms. Rost “could not effectively run the office”, that Ms. Rost had “no credibility”.

8. There was no proof or testimony proffered at the hearing that any criminal statute, civil statute or written regulation prohibits Ms. Rost's conduct. Nothing was cited to Ms. Rost when she was given the option to resign or be terminated. Nothing was cited in the Employer's Post-Hearing Brief.

9. The basic contentions of the Employer are:

a. The BMS lacks jurisdiction. Ms. Rost is an "at-will employee" and therefore the BMS is without jurisdiction to hear her petition for independent review; as a consequence, the Independent Hearing Officer appointed by the Minnesota Bureau of Mediation Services, is without jurisdiction to hear and decide the matter.

b. A Writ of Certiorari to the Minnesota Court of Appeals is required for any review.

c. The proper standard of review is limited and this independent hearing officer, if he has any authority, can only use the standard of review which would be used by way of a Writ of Certiorari. That review is whether the Alexandria Housing and Redevelopment Authority acted in an arbitrary and capricious manner. The Employer contends that the Alexandria HRA's decision to ask for Ms. Rost's resignation was reasonable and supported by substantial evidence in the record.

d. Further, if it is determined that the scope of review in this matter is the standard applicable to grievance arbitrations, the evidence supports affirmation of the HRA employment decision in that: a) the evidence shows that Ms. Rost lacked good judgment; b) the Alexandria HRA provided Ms. Rost a hearing before the Board prior to deciding on her continued employment; c) the Board imposed a disciplinary action intended not to embarrass Ms. Rost before other employees or

the public as required by its policies; d) Ms. Rost's testimony at the independent review hearing was not credible; e) Chair Colleen Thompson's testimony was credible at the independent review hearing.

Therefore, the Employer contends that Ms. Rost's Petition for Independent Review should be dismissed for lack of jurisdiction. Even if BMS has jurisdiction, the evidence presented at the independent review hearing shows that the HRA acted reasonably and according to its policies in asking for [Ms.] Rost's resignation. Therefore, the HRA's decision-making should be affirmed. [Post-Hearing Brief of Employer at 5].

10. The basic contentions of the Employee are:

- a. BMS has jurisdiction over Ms. Rost's case;
- b. The standard of review under Minn. Stat. § 179A.25 is de novo review, in which the Alexandria Housing and Redevelopment Authority has the burden of proof;
- c. Ms. Rost does, in fact, have terms and conditions of employment and those terms and conditions were violated in the manner in which the HRA discharged her.

As a consequence, the employee asks that she be "reinstated to her position with all back pay, lost benefits and reimbursement for all out-of-pocket expenses caused by lost benefits, such amounts to be computed by the parties with any disagreements to be submitted to the [independent hearing examiner] for resolution". If, however, discipline is in order, the employee urges that there are a number of mitigating factors such as: a) Ms. Rost was a valuable employee and had particular success in expanding the HRA's base of properties in obtaining grant funding for the agency; b) Ms. Rost had gone without her own prescription medication of Zoloft for several days and had trouble understanding what was happening in the heat of the March 12, 2004 meeting and specifically, of what she was accused of doing; and c) if there is to be any discipline, the only appropriate discipline is a reprimand to include a statement of the Alexandria HRA's policy on disposal of abandoned medical property.

DECISION AND RATIONALE

A) Jurisdiction

The first question is whether this independent hearing officer has jurisdiction to determine this matter.

Minn. Stat. § 179A.25 states:

It is the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment. When such review is not provided under statutory, charter, or ordinance provisions for a civil service or merit system, the governmental agency may provide for such review consistent with the provisions of law or charter. If not other procedure exists for the independent review of such grievances, the employee may present the grievance to the commission under procedures established by the commissioner [of the Minnesota Bureau of Mediation Services].

The Alexandria Housing and Redevelopment Authority brought a motion for summary judgment in district court, *Alexandria Housing and Redevelopment Authority v. Bureau of Mediation Services and Judith A. Rost, et al*, Case File No. 62-CX-04-11127 (Ramsey County District Court). On August 16, 2004, Ramsey County District Court Judge William H. Leery denied Alexandria Housing and Redevelopment Authority Summary Judgment and dismissed the HRA complaint that the BMS lacked jurisdiction. The Alexandria HRA appealed the case to the Minnesota Court of Appeals. On October 10, 2006 in an unpublished decision, the Minnesota Court of Appeals in *Alexandria Housing and Redevelopment Authority v. Bureau of Mediation Services and Judith A. Rost, et al*, 2006 WL 2865496, affirmed the decision of the Ramsey County District Court. The Minnesota Court of Appeals affirmed the lower court decision that the Bureau of Mediation Services had jurisdiction in this matter to appoint an independent hearing officer determining because the public employer's grievance procedures did not provide for review by a disinterested party or agency; and, the employee had no other process for independent review. Therefore the Minnesota Court of Appeals held that the petition fell within the jurisdiction of BMS. The Minnesota Supreme Court denied review of the case on December 12, 2006.

Arbitrator A. Ray McCoy, in a similar petition for independent review case entitled *Smutka and*

City of Hutchinson, Minnesota, BMS Case No. 04-PIR-230 (November 1, 2004), stated:

However, once a public employee is granted the right of independent review, the BMS may assign one of its hearing officers to hear the grievance or provide the parties with a list of 7 arbitrators. If the BMS does the latter and the parties select an arbitrator, that arbitrator will act on the authority delegated to him/her by the commissioner.

In other words, once selected, the arbitrator takes his/her marching orders from the BMS as if he/she was a member of the staff of that state agency. Those orders require the arbitrator to conduct a hearing that is a mere image, albeit less formal, of a trial court proceeding.

For example, the arbitrator is required to issue findings of fact, conclusions of law and orders. ...

These requirements impose a burden on the arbitrator presiding as a hearing officer in an independent review to inquire fully into the facts relied upon by the employer in reaching its employment decision. The hearing officer can facilitate a settlement or agreement between the parties at any point in the proceeding, decide the matter against the party who fails to appear for the hearing and consider applications from a person or organization to intervene ...

To carry out this requirement, the hearing officer must allow the parties the opportunity to call, examine and cross-examine witnesses. The hearing officer may also require the production of documentary or other evidence deemed necessary to become fully acquainted with all facts relating to the case. The procedures include instruction to the hearing officer on the handling of objections to the introduction of evidence and adherence to evidentiary rules including privileges. Even more akin to trial court procedures, the presiding officer "may allow the taking of depositions to preserve testimony in the same manner prescribed by Minnesota Rules of Civil Procedure". [Citation omitted] ... Nothing in the policy contemplates a limited review of the record established by the employer reaching a decision. It is impossible to reconcile procedures for review on writ of certiorari with these procedures that mirror in most details a trial court proceeding. ... The parties took full advantage of their right to examine and cross-examine witnesses, introduce documentary evidence and to help the hearing officer understand firsthand the facts that did and did not go into the decision to terminate. ... Under the procedures outlined by the BMS and used by the parties, no other result could follow, but a de novo review of the facts related to the termination decision that gave rise to this proceeding. ... The hearing officer finds that the proper standard or scope of review is de novo.

Based on the above Minnesota Court of Appeals case and the decision of Arbitrator Ray McCoy, it is held that this hearing officer has jurisdiction over the matter and has de novo authority to make a decision premised on the evidence presented at the independent hearing.

B) Merits and Remedy

Did the Alexandria Housing and Redevelopment Authority terminate Ms. Rost in a manner consistent with its policies and procedures and other relevant laws? If not, what is the appropriate remedy?

1) Terminated or Resigned

The first question is whether Ms. Rost was terminated or did she resign? The facts are clear that Ms. Rost's choice given by the Alexandria HRA Board was to resign or to be terminated. In other words, her employment with the HRA was over and there was nothing voluntary about her choice. The Minnesota Court of Appeals in *Anderson v. St. Paul Public Housing Authority*, 196 W.L. 22318 Minn. App. (January 23, 1996) (unpublished), in connection with a "resign or be fired" issue in a veteran's preference case, said:

... [t]his court has held that where an employee is forced to resign or be demoted, the action is not voluntary. *Southern Minn. Mun. Power Agency v. Schrader*, 380 N.W.2d 169, 172-73 (Minn.App.1986), *reversed on other grounds*, 394 N.W.2d 796 (Minn.1986). *Schrader* involved an employee who was told following a disciplinary meeting "that he had 'five seconds' to decide whether to resign or be fired." *Id.* at 170. This court found that "he did not resign voluntarily but was discharged." *Id.* at 172. We are unpersuaded by PHA's attempt to distinguish *Schrader* because the termination in that case was disciplinary rather than performance based and because the employee had to make an immediate decision. Neither point is relevant to the decision in *Schrader* that giving a choice between being fired and a "voluntary" alternative renders the choice involuntary.

2) Merits of the Case

Getting to the merits of the case, the question is, did Ms. Rost "steal" the Zoloft abandoned by the resident, as the Board seems to believe; or, did Ms. Rost violate the procedures and regulations, as the Board also seems to believe.

It is clear the pills were abandoned. She inquired what she should do with the pills and was told on the phone, not by the Alexandria Housing and Redevelopment Authority, but by an employee of Vikingland Home Health agency which no longer had jurisdiction over the resident, that she should inventory them and then flush them down the toilet. When Ms. Rost realized that the Zoloft was the exact medication and strength that she takes, she testified she stated it was a shame she had to destroy them. Her testimony was that she wondered if it was permitted for her to take them. She took them and placed them in her pocket when two clients came into her office. She forgot that she had them in her pocket until the end of the day. When she realized they were in her pocket, she took them out and placed them in a sandwich bag and put them on the desk in another office with the intent to find out if she was permitted to use these for herself. There they remained until she was confronted by Colleen Thompson on March 12, 2004. The facts prove by a preponderance of the evidence that she intended to find out if it was permitted for her to keep this abandoned property and use the pills herself since the pills were the exact medication she had prescribed to her by her own doctor. She had no intention of stealing them. The pills had been abandoned. Zoloft is not a controlled substance. There was no statute introduced at the independent hearing saying the use by another of such medication is illegal.

As to whether Ms. Rost violated an HRA policy or a regulation, no Alexandria HRA written policy or written regulation governing these circumstances was introduced at the independent review hearing. Ms. Thompson admitted at the hearing that there was no written HRA regulation or policy; and, that she was unaware of prior incidents by which to establish a practice or custom of the agency. Ms. Rost herself testified that in the past she had once directed disposal of medicines left by a tenant, but these medications were narcotics. However, that was the only prior occasion during Ms. Rost's tenure that the issue of disposal of medications of any kind had arisen.

There was no proof offered by the Alexandria Housing and Redevelopment Authority of any criminal statute, civil statute, regulation or policy that prohibits Ms. Rost's conduct. None was cited when Ms. Rost was given the option to resign or be terminated. None was cited at the Independent

Hearing Review. There is no proof that Ms. Rost did anything criminal, illegal or otherwise proscribed. What Ms. Rost did was to comment about what a shame it was to destroy the pills; put them in her pocket; take them out of her pocket and put them in a sandwich bag; put them on the desk; and then forget about them until she was confronted with the Special Meeting of March 12, 2004. She was then given inadequate notice and time to prepare. She was understandably stressed. She had inadequate time to consult an attorney. Ms. Rost had neither violated the law nor any regulation or policy; yet she faced an accusation in which she essentially had no time to prepare an adequate defense and which resulted in the Board telling her to resign or be terminated.

The Board did an inadequate investigation; gave Ms. Rost an inadequate notice; and gave her an inadequate hearing. At the “special meeting/hearing” of March 12, 2004, she was understandably stressed. She had not been taking her own medication for several days because she had forgotten to bring them with her when she went to the meeting in Minneapolis. She had received no written notice before the hearing describing in detail exactly what she was charged with doing. She was given the written report made by her assistant [See Finding of Fact # 5 above] at the meeting of September 12, 2004 and asked to respond to it. The process of law given to Ms. Rost was an unfair both as to notice and hearing.

One of the key reasons why the legislature in the State of Minnesota has made it a public policy that every public employee should be provided with the right of independent review [Minn. Stat. 179A.25] is to avoid such inadequate due process of law. Under the concept of due process of law, every public employee in the State of Minnesota must be provided with a fundamentally fair independent review which necessarily includes fair investigation, fair notice and a fair hearing. Ms. Rost received none of these from the HRA Board. If a fair investigation, fair notice and fair hearing had been done, it is very likely the Board would have more fully understood the facts and not leapt to hasty conclusions. Rather it is likely that the Board would have simply told Ms. Rost she could not keep such

medications and to flush the pills down the toilet. It is equally logical the Board would have then drafted a written regulation to cover such a circumstance.

Ms. Rost's discharge is reversed. She is reinstated immediately with all back pay and lost benefits and reimbursement for all of her out-of-pocket expenses caused by lost benefits, such amounts to be computed by the parties, with any disagreements to be submitted to this independent hearing officer for resolution. There shall be a set off for all wages, unemployment benefits and other money earned in other employment endeavors.

The hearing officer will maintain jurisdiction over this case until October 1, 2007. All references to Ms. Rost's discharge and the reasons therefore should be removed from the Alexandria HRA personnel records and destroyed.

As persuasively argued in Ms. Rost's Post-Hearing brief, "[t]he [independent hearing officer] should not be daunted by the prospect that the Alexandria HRA may be forced to pay three year's back pay (less actual earnings). The length of time between Ms. Rost's discharge and the present is the sole result of HRA's legal maneuverings to avoid this independent review hearing". [Employee's Post-Hearing Brief at 17, Footnote 6].

Dated: July 23, 2007.

Joseph L. Daly
Arbitrator