

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 06/23/17; Decision Issued: 06/27/17; Agency: Department of Corrections; AHO: John V. Robinson, Esq.; Case No. 11031; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11031

Hearing Officer Appointment: June 1, 2017

Hearing Date: June 23, 2017

Decision Issued: June 27, 2017

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of her employment effective April 14, 2017, pursuant to a written notice, issued April 14, 2017, by Management of Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated May 11, 2017.

The parties participated in a first pre-hearing conference call scheduled by the hearing officer. The Grievant, by her advocate, confirmed she is seeking reinstatement, back-pay and restoration of all benefits.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on June 8, 2017 (the "Scheduling Order"), which is incorporated herein by this reference.

The parties timely exchanged and delivered to the hearing officer pursuant to the Scheduling Order, their proposed exhibits and witnesses for the hearing.

At the hearing, the Grievant was represented by her advocate and the Agency was represented by its attorney. 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 hearing¹. The hearing officer used his own recording equipment and tapes.

No open issues concerning non-attendance of witnesses remained by the conclusion of the hearing.

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are designated GE 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. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was formerly employed as an Inmate Grievance Coordinator/ Institutional Ombudsman by the Agency at a level 4 correctional facility (the "Facility").
2. Security and safety at the Facility of staff, offenders and the public are paramount. Fraternalization is strictly prohibited because it can compromise the integrity of the institution and staff and can lead to other serious issues and problems for the Facility such as violations of Agency policies relating to contraband, blackmail, romantic liaisons between staff and offenders, etc.
3. The Grievant and an associate formed a motivational organization in July 2016 (the "Organization") to inform, educate, motivate and inspire the community and to become activists for social justice and community organizing.
4. As part of its mission, the Organization conducts interviews with members of the community which are aired to the public.
5. On March 7, 2017, the Grievant co-hosted a radio and video interview with an offender who is still under supervision by the Department and could remain so until 2020 because of the serious nature of the crimes which he committed (the "offender"). GE 2 at 5.
6. The offender was interviewed, amongst other things, concerning his experience with the Department and the Virginia Criminal Justice System and the flaws of these institutions. While not all of the Grievant's comments were negative about the Department, many negative comments were made by the Grievant.

7. The Grievant never reported the interview to her supervisor or to the Department or sought authorization to comment publicly on the Department, as required by policy.
8. The Grievant also interviewed the offender concerning his recent book "Beyond the Bars" which detailed his serious crimes, experience with the Department, etc.
9. The Grievant questioned the offender about the book and promoted the book. The book tells of the offender's rehabilitation and God's grace.
10. Approximately 47 minutes into the interview, the offender clearly stated he was still on paper, slang for supervised probation.
11. In any event, from the title of the book and from the facts and circumstances recounted in the book and discussed in the interview, about which the Grievant remarked, the Grievant was on notice that the offender was in all probability or likelihood still under Agency supervision.
12. The Grievant took a photograph with the offender and the broadcast is still publicly available.
13. The testimony of the Agency witnesses was credible on the material issues before the hearing officer. The demeanor of such witnesses was candid and forthright.

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 Operating Procedure 135.1 ("Policy No. 135.1"). AE 3. 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.

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 Policy No. 135.1, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy No. 135.1 provides in part:

V (D). THIRD GROUP OFFENSES (GROUP III):

1. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

2. *Group III* offenses include, but are not limited to:
.....
(z) Violation of DOC Operating Procedure 130.1,
*Rules of Conduct Governing Employees
Relationships with Offenders*
.....
(ff). Fraternalization or non-professional relation-
relationships with offenders who are within
180 days of the date following their discharge

from Department custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Operations Chief or Deputy Director of Administration on a case by case basis (*see Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders*).

AE 3.

Department Operating Procedure Number 130.1, now 135.2 (*Rules of Conduct Governing Employees' Relationships With Offenders*) provides in part as follows:

Fraternization - Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.

Offender - An inmate, probationer, parolee, post release supervisee, or other person placed under the supervision (conditional release) or investigation of the Department of Corrections.

IV (B). Professional Conduct - Employees of the DOC shall exercise professional conduct when dealing with offenders to ensure the security and integrity of the correctional process...

2. **Vigilance** - Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of departmental operating procedures. Observed incidents or suspicions of planned incidents shall be reported to the employee's supervisor or the appropriate officer in accordance with established procedures.
5. **Interactions** - ...Employees are encouraged to interact with offenders on an individual and professional level while maintaining and reinforcing appropriate professional boundaries to promote and accomplish DOC goals.

IV (C). Improprieties: Non-Professional Association

1. Fraternalization -

a. Except for preexisting relationships (see below), fraternization or non-professional relationships between employees and offenders are prohibited, including when the offender is within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last.

i. This action may be treated as a Group III offense under Operating Procedure 135.1, *Standards of Conduct*.

2. Improprieties -

Associations between staff and offenders that may compromise security, or undermine the employee's ability to carry out his or her responsibilities may be treated as a Group III offense under Operating Procedure 135.1 *Standards of Conduct*.

5. Communication and Contact. As long as the offender is under the custody, care, or supervision of DOC, any unexpected, incidental, non-work related contact with offenders or their families should be reported to the Unit Head promptly and documented in VACORIS *Case Notes*, as necessary.

D. Offender Abuse Prevention

3. Physical contact with offenders shall be conducted in a professional manner using the minimum amount of force necessary to provide appropriate apprehension, intervention, and control as needed to protect the offender, staff and the general public, and to maintain a safe and secure environment.

E. Employee and Supervisory Reporting Responsibilities

1. Failure to comply with the reporting requirements outlined below will be considered a violation of Operating Procedure 135.1, Employee Standards of Conduct, and may be subject to disciplinary action up to and including termination.

2. Employee Responsibilities - In addition to complying with the above procedures, employees have a continuing affirmative duty to disclose to their supervisors or other management officials any conduct that violates this procedure or behavior that is inappropriate or compromises safety of staff, offenders, or the community and any staff or offender boundary violations. (4-APPFS-3E-05)
3. Supervisory Responsibilities - Supervisors shall ensure that all reports of violation of this operating procedure are forwarded to the Organizational Unit Head for investigation and notify the PREA Analyst.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning fraternization constituted a Group III Offense. The Grievant was clearly required by policy to report the interview, the Facebook posting and other interactions with the offender.

Agency Operating Procedure 310.2 (Information Technology Security) provides in part:

- ...(h) The following are examples of what should not be published, posted, or displayed; this list is not all inclusive:
- ...(x.) Pictures or images of staff with offenders under supervision

AE 5 at 77.

The Grievant's advocate appropriately demonstrated that an Agency "Investigation Matrix", Attachment 1 to O.P. 030.4, shows that the SIU should handle instances of "confirmed fraternization". This Matrix appears to conflict with O.P. 030.4 IV (B)(3) and (D)(9)(j), which both suggest that SIU is authorized to, but is not mandated to, conduct any such investigations. In any event, the Assistant Warden in this case handled the investigation and not SIU.

While the hearing officer is sympathetic to the Grievant's point that the investigation might have been flawed, it does not negate the fact that the Agency has shown fraternization by the Grievant upon the required evidentiary standard of a preponderance of the evidence.

The hearing officer agrees with the attorney for the Agency that the Grievant was on notice that the offender was under Agency supervision and the offender plainly stated this fact in the interview. The title of the offender's book in itself should have alerted the Grievant to the possibility. GE 5, a brochure published by the Agency to promote awareness and prevention of fraternization provides in part:

INTRODUCTION

The DOC prohibits and will not tolerate fraternization or sexual misconduct by staff, contractors or volunteers with offenders or between

offenders as defined in Operating Procedure 038.3, Prison Rape Elimination Act (PREA) and Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders. DOC procedures and criminal law forbid any unprofessional, unacceptable, or prohibited contact between employees and offenders under DOC custody or supervision, and for 180 days after the offender's release from custody or supervision whichever occurs last.

If a co-worker is known to be an ex-offender who is under DOC supervision or within 180 days following discharge from custody or termination from supervision, whichever occurs last, interactions shall be limited to appropriate professional boundaries and support.

CONCLUSION

Inappropriate relationships between employees and offenders are dangerous to everyone. Employees of the DOC should exercise professional conduct when dealing with offenders to ensure the security and integrity of the correctional process.

This brochure is intended to remind supervisors and staff of warning signs, prevention strategies, and their responsibilities to address potential inappropriate relationships.

Supervisors and staff should discuss this topic on a regular basis. Everyone must be aware of potentially inappropriate employee/offender relationships and be proactive in preventing fraternization.

Improprieties or associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under Operating Procedure 135.1 *Standards of Conduct*.

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 attorney 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:

DHRM'S *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 did consider the Grievant's years of service and performance, mitigating factors, in disciplining the Grievant. AE 1.

The Grievant has specifically raised mitigation in the hearing and in her 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, in the Written Notice, in the Form A and all of those listed below in his analysis:

1. the Grievant's service to the Agency for about 8 years;
2. the often difficult and stressful circumstances of the Grievant's work environment; and
3. the apparent lack of prior discipline
4. the investigation
5. the fact that the Grievant did not book the offender for the interview, etc.
6. the positive aspects of the interview concerning rehabilitation
7. the community efforts of the Grievant

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. There were also aggravating factors such as the Grievant's negative public comments concerning the Agency, her failure to get authorization

concern the publication, etc. 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.

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.

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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **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 refer 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 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed to (804) 786-0111 or e-mailed to EDR.

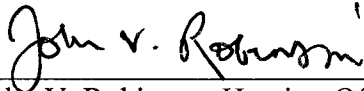
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the 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 EDR before filing a notice of appeal.

ENTER: 6/27/2017



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).