Issues: Group III Written Notice with Termination (fraternization); Hearing Date: 07/17/07; Decision Issued: 07/18/07; Agency: DOC; AHO: Cecil H. Creasey, Jr.; Case No. 8636; Outcome: Partial Relief; **Administrative Review: HO Reconsideration Request received 07/26/07 and 08/01/07; Reconsideration Decision issued 08/02/07; Outcome: Original Decision Affirmed; Administrative Review: EDR Ruling Request received 07/26/07; Outcome pending; Administrative Review: DHRM Ruling Request received 07/26/07; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8636

Hearing Date: July 17, 2007
Decision Issued: July 18, 2007

PROCEDURAL HISTORY

On January 8, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal based on an investigation of the Special Investigations Unit concluding that Grievant fraternized with a client on intensive supervision after release from a state correctional center (the same correctional center where Grievant worked). Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 18, 2007, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution. On July 17, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Counsel for Grievant
Two witnesses for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
Two witnesses for Agency (including Representative)

ISSUES

Did Grievant's conduct warrant disciplinary action under the Standards of Conduct and Agency policy? If so, what was the appropriate level of disciplinary action for the conduct at issue?

The Grievant requests rescission of the Group III Written Notice, reinstatement to her position, back pay and benefits, and an award of attorney's fees. Alternatively, the Grievant seeks a reduction in the level of discipline.

BURDEN OF PROOF

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

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[1]

Department of Corrections (DOC) Operating Procedure 130.1(III) defines fraternization as:

[1] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

> The act of, or giving the appearance of, association with offenders, and/or their family members that extends to unacceptable, unprofessional and prohibited behavior.

DOC Operating Procedure 130.1(V)(A) states,

> Fraternization or non-professional relationships between employees and offenders is prohibited, including when the offender is within 180 days of the date following his or her discharge from Department custody or termination from supervision, whichever occurs last. This action may be treated as a Group III offense under Operating Procedure 135.1, *Standards of Conduct and Performance*. . . .

DOC Operating Procedure 130.1(V)(B) states,

> Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and … families of offenders is prohibited.

Fraternization

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

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities for approximately eight years until her removal effective January 8, 2007. No evidence of prior disciplinary action against Grievant was introduced during the hearing. The Grievant testified there were no prior Group Notices.

In the fall of 2006, Grievant began a personal relationship with TM, a parolee. Although the parolee was incarcerated at the same facility where the Grievant worked, the Grievant maintained she was unaware of TM's parolee status. The Grievant worked at the facility in a floater capacity, and may have come in contact with TM from time to time. After starting her friendship with TM, the Grievant heard some non-specific information that TM had been "locked up." The Grievant terminated her friendship with TM after a few dates. The Agency received an anonymous tip of the relationship and began an investigation. As part of the investigation, Grievant admitted she had a brief relationship with TM. The Grievant denied knowing TM was a parolee at the time of the relationship. The Grievant testified that TM's past and record was never discussed during their personal time together. The Grievant testified that they only discussed politics and food. The Grievant did not testify or suggest that TM misrepresented to her or concealed his status as a parolee.

The Grievant testified that she had already elected to terminate her relationship or friendship with TM when she learned from an unidentified person that TM may have been

"locked up." The Grievant changed her telephone numbers to dissuade any further contact from TM, but she did not take any steps to determine specifically whether TM was a parolee. The unsworn written statement from the parolee indicated that he knew the Grievant from professional contact while actually incarcerated. A convicted felon's credibility is suspect, and his unsworn statement carries less weight than the testimony of a sworn witness. However, the parolee's statement also revealed his knowledge of the special investigator's interview of the Grievant, and that the Grievant telephoned him to discuss the internal investigation. According to the special internal investigator, the parolee knew of the interview of the Grievant independently, and the parolee stated the Grievant telephoned him with that information and detailed the interview conversation. Thus, the credibility of the Grievant is also suspect.

The Agency's other witness, the warden senior, testified that the policy against fraternization is grounded in the security of the Agency's mission of integrity and trust. The warden testified that the policy makes it incumbent on all employees to report any such non-professional relationship to supervision when it becomes known to the offender. Fraternization can be a major problem in correctional facilities. When an inmate establishes a personal relationship with an employee, either the inmate or the employee can use that relationship for harm—even unwittingly. At another level, the inmate may become a victim from such a relationship. It does not matter whether the relationship involves physical intimacy. For this reason, the agency has taken a very firm stand on disciplining fraternization infractions.

The warden also testified that mitigating factors were not considered because of the Agency's stance on fraternization infractions. The warden characterized the Agency's response as a zero tolerance of fraternization offenses.

After considering the evidence presented and the credibility of the witnesses, I find that the Grievant violated Operating Procedure 130.1, by her act of, or giving the appearance of, association with the offender identified for a personal, non-professional relationship. I do not find credible her testimony that she was completely unaware of the parolee's status when she was engaged in the relationship. I find that a Corrections employee has the inherent obligation to determine the propriety of personal relationships, given the public trust and stated policy concerning professional and personal relationships of Corrections employees. I find that a Corrections employee has an inherent duty, grounded in Operating Procedure 130.1, to make a reasonable inquiry before engaging in personal relationships with unfamiliar individuals. Assuming the Grievant was actually and completely unaware of TM's status, there is no evidence that the Grievant made even the most minimal inquiry to honor the applicable policy against fraternization and protect the public trust inherent in her position. Thus, I find the Grievant violated the policy against fraternization as charged in the Written Notice.

I do not find the applicable policy against fraternization unenforceable, as argued by the Grievant. Challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.A.

Mitigation

The Grievant submits that the infraction was relatively minor, that she took steps unilaterally to sever her relationship with the parolee, and that these circumstances and her tenure of good standing should mitigate the discipline to a less severe level than termination. Management is reserved the exclusive right to manage the affairs and operations of state government. The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's actions in finding a violation of the fraternization policy are consistent with law and policy. However, refusing even to consider mitigation is contrary to law and policy.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). EDR's Hearing Rules provide in part:

> The *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.

Hearing Rules § VI.B.1 (alteration in original). Therefore, if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.

Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. DOC Operating Procedure 135.1, § IX. However, a hearing officer's authority to mitigate under the Hearing Rules is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the Hearing Rules, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. 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.

Thus, because the Agency did not consider mitigation, the hearing officer does not have the Agency's deliberation of and application of mitigating circumstances to consider and review under the applicable standard of review. The hearing officer may not substitute his judgment for the Agency's—he may only review the Agency's discipline to determine if it exceeded the limits of reasonableness (after consideration of mitigating factors). I find that the Agency is obligated to consider mitigating factors under the Standards of Conduct. The applicable policy does not mandate a single sanction. Because the Agency did not consider mitigating factors, as it is required to do, the disciplinary process and record is incomplete.

DECISION

For the reasons stated herein, I vacate the level of discipline and remand this matter back to the Agency to repeat the disciplinary action for violation of the policy against fraternization. Specifically, the Agency must examine mitigating factors, in accordance with the applicable Standards of Conduct, and make a new discipline determination that specifically considers mitigating circumstances and whether they justify reducing the level of discipline. The Agency may exercise its discretion within the limits of reasonableness, but it must consider mitigation for determining the Group level of offense and/or the accompanying discipline, accordingly.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite 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.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION OF
DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8636

Hearing Date:	July 17, 2007
Decision Issued:	July 18, 2007
Reconsideration Request Received (Grievant):	July 26, 2007
Reconsideration Request Received (Agency):	Aug. 1, 2007
Reconsideration of Decision Issued:	Aug. 2, 2007

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[2]

OPINION

Both the grievant and the agency request reconsideration of the July 18, 2006, decision. The grievant asserts that the hearing officer failed to recognize the grievant was arguing the applicable policy against fraternization did not apply to the grievant's actions; that a plain reading of the policy did not apply to the grievant's actions; and, that the grievant did not have a duty to report an inappropriate relationship. Further, the grievant asserts that the hearing officer must consider the principle of mitigating circumstances when the agency did not consider it; and

[2] § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004.

that the hearing officer has no authority to remand the matter back to the agency to repeat the level of discipline and first consider and apply mitigating circumstances. The agency asserts that it has no requirement to consider mitigating circumstances, and that the hearing officer has no authority to remand the matter back to the agency to repeat the level of discipline.

Upon consideration of the merits of whether the policy applied to the grievant's actions, I reiterate my initial decision on this matter. My initial decision considered the credibility of the grievant's testimony, and I find no basis to conclude the policy against fraternization was improperly applied to the claimant's actions.

Regarding the agency's assertion that it does not have to consider mitigating circumstances, I reiterate my initial decision on the grounds stated in the decision. The agency has provided no authority that it has the discretion to ignore completely mitigating circumstances that might apply. The agency has the discretion to exercise its judgment, but it must make a finding regarding mitigation circumstances as opposed to refusing to consider mitigating circumstances. The hearing officer has not pre-determined how mitigating circumstances might apply in this case.

As to the authority of the hearing officer to remand the matter back to the agency to consider mitigating circumstances, the grievant cites no authority against such relief. The grievant's position was that the agency did not consider mitigating circumstances—a position with which the hearing officer agreed.

According to the Grievance Procedure Manual, §5.9(a), examples of relief which may be available:

1. Reinstatement to the employee's former position or, if occupied, to an objectively similar position;
2. Upholding, reducing or rescinding disciplinary actions;
3. An award of full, partial, or no back pay, from which interim earnings must be deducted;
4. The restoration of full benefits and seniority;
5. An order that the agency comply with applicable law and policy, and,
6. Attorneys' fees in discharge grievance hearings where the hearing officer orders reinstatement and the employee is represented by an attorney, unless special circumstances would make an award unjust. See "Special Rules for Discharge Hearings," § 7.2(e).

According to the Grievance Procedure Manual, §5.9(b), examples of relief which are not available:

1. Damages;
2. Attorneys' fees in grievance hearings not challenging discharge;

3. Hiring, promotion, transfer, assignment or retention of any employee;

4. Establishing or revising compensation, classification or benefits;

5. Establishing or revising policies, procedures, rules, or regulations;

6. Taking any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance);

7. Directing the methods, means or personnel by which work activities are to be carried out; or,

8. Any other relief that is inconsistent with the grievance statute or procedure.

Remanding the matter to the agency to consider mitigating circumstances is an order for the agency to comply with applicable law and policy. It is not prohibited by the Grievance Procedure Manual, and it appears to the hearing officer such relief is consistent with the grievance procedure. The hearing officer is not bound by the relief requested by the grievant. EDR Hearing Rules, § VI.A. Further, the hearing officer's latitude on applying mitigating circumstances appears to be derivative of how the agency applied mitigating circumstances. The facts of the offense itself are reviewed by the hearing officer *de novo*; however the application of mitigating circumstances is more restricted. *See* EDR ADMINISTRATIVE REVIEW OF DECISION #5848; Ruling Date: March 12, 2004; Ruling #2004-583; EDR ; EDR ADMINISTRATIVE REVIEW OF CASE #8452/HEARING DECISION APPEAL; Ruling Date: February 27, 2007; Ruling #2007-1518.

The grievant argues that the agency is incapable of applying mitigating circumstances fairly or properly, and should not be given a second chance to do so. However, that position is not grounded in any basis in the record—it is mere speculation. The grievant argues the hearing officer has no authority to remand, yet the Grievance Procedure Manual specifically refers to authority of the hearing officer to order the agency to comply with applicable law and policy. The grievant also argues that the hearing officer limited the scope of mitigating circumstances the agency may consider. I note, however, as clarification, that the grievance decision does not restrict the agency's consideration of what mitigating circumstances may be applied. No inference to the contrary should be made by either side.

In summary, I find no provisions, statutes, regulations, or judicial decisions as a basis to challenge the hearing officer's conclusions of law or decision directing the agency to reconsider its discipline and apply mitigating circumstances. The grievant's disagreements on the facts of the offense, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

DECISION

Neither the grievant nor the agency has established an incorrect legal conclusion. The hearing officer has carefully considered the grievant's and agency's arguments and concludes that there is no basis to change the Decision issued on July 18, 2007.

APPEAL RIGHTS

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, 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.[3]

Cecil H. Creasey, Jr.
Hearing Officer

[3] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).