Issues: Group III Written Notice (fraternization) and Termination; Hearing Date: 06/10/08; Decision Issued: 06/12/08; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 8867; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8867

Hearing Date: June 10, 2008
Decision Issued: June 12, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on February 14, 2008 for:

> An Agency Investigation revealed that the Grievant had been in contact with a paroled offender on supervised probation by phone communication and in person. The Grievant did not report these contacts or seek approval to have contact with the female probationer. Fraternization Policy 130.1 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 is a serious violation and warrants a Group III with termination under the Standards of Conduct.

On March 7, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 13, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 10, 2008, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Agency Representative
Agency Party
Witnesses

ISSUE

1. Whether the Grievant's actions justified receipt of a Group III Written Notice of disciplinary action with removal for fraternizing with a parolee.

BURDEN OF PROOF

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

FINDINGS OF FACT

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

The Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections and that notebook was accepted in its entirety, as Agency Exhibit 1. Tab 10 contained no documentation. The Grievant provided the Hearing Officer with only one Exhibit, which Exhibit was included in the Agency's notebook, Tab 2. It was agreed that the Grievant would refer to Agency Exhibit 1, Tab 2 when he needed to make reference to his Exhibit.

The facts in this matter were largely undisputed. The Grievant was a Corrections Sergeant for the Agency. On or about August 22, 2007, the Institutional Investigator for the Agency received information from an inmate that a current employee of the Agency, not the Grievant, was having a relationship with a former inmate. This prompted an investigation and, in the course of that investigation, the Institutional Investigator developed information that pertained to the Grievant. The Grievant was not the direct focus of the primary investigation but was a secondary focus. [1] The Institutional Investigator questioned the parolee in the course of his investigation and she signed an Investigative Interview, dated October 23, 2007, consisting of three (3) pages. [2]

In that interview, she stated that, "After I got out of prison I call [facility] to tell [Grievant] I had been released. I talked to Sergeant A at that time." Later in that same interview she said, "I contacted [Grievant] at [facility]. While speaking to him I began talking to Sergeant A." These are the only references that the parolee makes to the Grievant in her Investigative Interview. The Institutional Investigator listened to several recorded phone conversations between the parolee and an inmate. During one of those recorded phone conversations, on July 17, 2007, the parolee indicated that she talked to the Grievant on several other occasions. The parolee also indicated that she met the Grievant at a bar and shot a round of pool with him at that bar, beating him because he was drunk. [3] All of this was summarized by the testimony of a Special Agent for the Office of the Inspector General in his testimony. [4]

[1] Agency Exhibit 1, Tab 2, Page 8
[2] Agency Exhibit 1, Tab 2, Pages 11-13
[3] Agency Exhibit 1, Tab 2, Page 17
[4] Agency Exhibit 1, Tab 2, Page 3

In her allegations, the parolee alleged that another Correctional Officer impregnated her and that she had an abortion. Pursuant to the investigation of the Special Agent, it appears that the parolee lied about the entirety of the abortion story. [5] The Institutional Investigator indicated, in an e-mail sent to the Warden Senior, that he did not believe the parolee regarding the alleged impregnation and subsequent abortion. [6]

Both the Special Agent and the Institutional Investigator testified that there were parts of the parolee's story that they chose to believe and parts that they chose to disbelieve. The Agency did not call the parolee as a witness.

In the course of the investigation, the Grievant gave the Institutional Investigator an Investigative Interview consisting of one (1) page. [7] In that interview, the Grievant acknowledged that:

> "I talked to the parolee three or four times. I had seen her in person twice. I ran into her at the store near her mom's house. The other time she was at Raptures Lounge. I was shooting pool but not with her. She did not come to the bar with me."

During his testimony, the Grievant stated that he had met the parolee at a service station and that he had seen her at the bar while he was shooting pool. He again denied that he participated in a game of pool with her. He further testified that the three or four phone conversations were phone calls to his grandmother's house where he answered the phone, determined that it was the parolee and handed the phone to his grandmother, as the grandmother was the person with whom the parolee wished to speak.

The Grievant is accused of violating policies set forth in Operating Procedure 130.1.[8] That procedure defines Fraternization as follows:

> The act of, or giving the appearance of, association with offenders, or their family members, **that extends to unacceptable, unprofessional and prohibited behavior.** Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders. (Emphasis added)

It would appear from the above-referenced definition that fraternization somehow must rise to a level of unacceptable, unprofessional and prohibited behavior. The semantics of the first

[5] Agency Exhibit 1, Tab 2, Page 4
[6] Agency Exhibit 1, Tab 2, Page 9
[7] Agency Exhibit 1, Tab 2, Page 16
[8] Agency Exhibit 1, Tab 3, Page 1

sentence of the definition implies that there is some act that is acceptable and a level of acts which rise to unacceptable, unprofessional and prohibited behavior which is not acceptable.

Operating Procedure 130.1 further provides as follows:

> 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***. *(dated September 1, 2005, updated August 29, 2006).* Any exception to this section shall be reviewed and approved by the respective Regional Director on a case-by-case basis. [9]

Further, Operating Procedure 130.1 provides as follows:

> Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. 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 the Operating Procedure 135.1, ***Standards of Conduct and Performance***. *(dated September 1, 2005, updated August 29, 2006).*

In reviewing how Operating Procedure 130.1 defined fraternization, the Hearing Officer finds that the only possible example therein that would apply to the Grievant is a non-work related visit between offenders and employees. The Hearing Officer can find nothing in this procedure that would indicate that phone calls are synonymous with a visit. Meeting someone at a store or a filling station does not seem to qualify as a visit unless the meeting was planned. Meeting someone at a bar, again, does not seem to be a visit unless it was planned or unless the two people turned the unplanned meeting into a meeting.

When this policy indicates that fraternization is prohibited, that is not helpful to the Hearing Officer as , again, one must first define fraternization. Likewise, where the policy indicates that improprieties or the appearance of improprieties, fraternization, or other non professional association by employees and offenders is prohibited, it is not helpful, as there is no actual definition of what an impropriety is.

The Agency's witnesses seemed to disagree on when a Report should be made to a Supervisor that some level of fraternization took place. The Warden seemed to feel that the most

[9] Agency Exhibit 1, Tab 3, Page 2

de minimis meeting should be reported to a Supervisor. Her testimony was that, were she in a bar when a parolee entered, she would immediately leave the bar and notify her Supervisor. The Special Agent seemed to feel that would not be required. There was dispute between the Agency witnesses as to whether a phone call to the Grievant's home should be reported as opposed to a phone call to his grandmother's house where he simply answered the phone and passed the call on to his grandmother.

The Hearing Officer can find no language in Operating Procedure 130.1 that requires reporting of contacts or meetings or phone calls with parolees. The testimony of all three (3) of the Agency witnesses seemed to indicate that the major concern with the Grievant was that he did not report the phone calls or the fact that he was in the same place at the same time as the parolee at the bar and at either a filling station or a store. Indeed, in the Group III Written Notice, it was specifically alleged that, "The Grievant did not report these contacts or seek approval to have contact with the female probationer." It appears that the issue is not fraternization as much as it is the failure to report a contact. The Hearing Officer can find no rule that calls for him to report a contact.

Inasmuch as the Hearing Officer can find no duty to report fraternization in Operating Procedure 130.1, then the Hearing Officer is left to find that the phone calls and/or the inadvertent meetings with the parolee somehow fell under the definition of fraternization and were inherently prohibited. The Hearing Officer has insufficient evidence to find that the phone calls and meetings reached a level of fraternization such that they rose to unacceptable, unprofessional or prohibited behavior.

The Hearing Officer is also concerned about the veracity of the parolee's statements. The Hearing Officer has not been afforded the opportunity to hear testimony from the parolee. The Hearing Officer has only heard about the parolee's conversations with the Investigators. Had the Hearing Officer had an opportunity to hear the parolee as a witness, he could have observed her demeanor and she would have been subject to cross examination. For those reasons and others, it is difficult for the Hearing Officer to give significant weight to the statements of the parolee. She is a convicted felon and typically is unworthy of trust, she has had substantial free time to develop and coordinate rumors and she may have reason to harm those who controlled her. The phone conversations that the parolee had with the existing inmate are totally out of the control of the Grievant and the parolee could have fabricated those stories.

When the Hearing Officer considers the inherent lack of believability of the parolee, whose statement was unsworn, as compared to the Grievant's testimony which was sworn, when the Hearing Officer can find no reporting requirement in Operating Procedure 130.1, and when the Hearing Officer finds that the de minimis contact alleged does not fall within any definition of fraternization or prohibited contact as set forth in Operating Procedure 130.1, then the Hearing Officer is left with no choice but to conclude that the Agency was in error in the issuance of this Group III Written Notice.

The Agency wants to use Operating Procedure 130.1 (III) as if it reads as follows regarding parolees:

> **Fraternization** - If an employee of the Agency is contacted or contacts a parolee by phone, Internet or other electronic means or comes into close physical proximity with a parolee, regardless of what is said or done and regardless of the duration of such contact, then the employee shall immediately file a report with his Superior of such contact. Failure to file such a report may warrant a Group III Written Notice.

Unfortunately for the Agency's position, that is not what Operating Procedure 130.1 currently states and no interpretation of it as it is presently written will justify the Agency's current interpretation.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including " mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [10] Under the Rules for Conducting Grievance Hearings, "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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did not violate policy and that a Group III Written Notice was inappropriate. The Hearing Officer orders that the Grievant be reinstated to his former position or, if occupied, to an objectively similar position. The Hearing Officer orders that the Grievant be awarded full back pay, the restoration of full benefits and seniority.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the

[10] Va. Code § 2.2-3005

decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main Street, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[11] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[12]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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William S. Davidson
Hearing Officer

[11]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).

[12]Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.