

Issues: Group III Written Notice (Fraternization) and Termination; Hearing Date: 10/10/08; Decision Issued: 10/14/08; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8948; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8948

Hearing Officer Appointment: September 15, 2008

Hearing Date: October 10, 2008

Decision Issued: October 14, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment effective June 25, 2008, pursuant to a Group III Written Notice providing: “Violation of policy 130.1 Rules of Conduct Governing Employees Relationships with Offenders – You wrote letters, accepted phone calls & sent money orders to an offender while you were employed at [the Facility]. The offender was at [Correctional Facility] and then at [Work Center]. This is a blatant violation of the aforementioned policy: you are being terminated for this breach of policy.” AE 1.¹

The Group III Written Notice was issued on June 25, 2008 by Management of the Department of Corrections (the “Department” or “Agency”). AE 1. The hearing officer was appointed on September 15, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 4:00 p.m. on September 17, 2008. The Grievant, the Grievant’s advocate (her spouse), the Agency’s advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant’s advocate confirmed that she is challenging the termination for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including reinstatement. Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered September 18, 2008, which is incorporated herein by this reference.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by its advocate and the Grievant’s advocate represented the Grievant. The Grievant attended but did not testify at the hearing.

¹ References to the agency’s exhibits will be designated AE followed by the exhibit number.

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 hearing, namely Agency Exhibits 1 through 6.

APPEARANCES

Representative for Agency
Agency Witnesses
Grievant
Grievant Witnesses

FINDINGS OF FACT

1. The Grievant was a Corrections Officer (“C/O”), previously employed by the Agency at a prison and a work center (the “Facility”).
2. As part of his routine investigational duties, the Facility’s institutional investigator (the “Institutional Investigator”) discovered that the Grievant might be communicating with an inmate of the Department at a different facility (“Inmate A”).
3. The Institutional Investigator listened to and recorded collect phone calls made by Inmate A to the Grievant.
4. Over a period of about nine (9) months, from September 2007 to June 2008, Grievant accepted collect phone calls from Inmate A, communicated with Inmate A, she wrote to Inmate A and she sent money to Inmate A.
5. Grievant admitted these actions.
6. Grievant received continued training and reminders from Department personnel about the importance of staying focused and not fraternizing with inmates in violation of applicable Departmental policies and procedures.
7. The Institutional Investigator conducted a thorough and fair investigation and his findings were fair and reasonable.
8. The Department’s actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances. The Agency has fully accounted for any and all mitigating factors in determining the level of discipline meted out.

9. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
10. The testimony of the Agency representative and Institutional Investigator was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency representative and Institutional Investigator at the hearing was candid and forthright.

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 her 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 Department's Standards of Conduct are contained in Operating Procedure Number 132.1. AE 5. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. AE 5.

Group III offenses include but are not limited to:

- (25) violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees' Relationships with Offenders*.

Department Operating Procedure 135.1 (AE 5).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the Grievant's employment was warranted and appropriate under the circumstances. Clearly, Grievant substantially and materially violated Operating Procedure 130.1 over a lengthy period. AE 4.

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 Department Operating Procedure 135.1, 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 Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires dismissal. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The gravity of the violations in the context of the public safety demands of the Facility preclude a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the Grievant from her 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 in this proceeding 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 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, Suite 400, Richmond, Virginia 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 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).