Issues: Group III Written Notice (fraternization) and Termination; Hearing Date: 05/20/09; Decision Issued: 06/25/09; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 9072; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 06/30/09; Reconsideration Decision issued 08/05/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/17/09; EDR Ruling No. 2010-2368 issued 10/27/09; Outcome: Remanded to AHO; Remand Decision issued 12/14/09; Outcome: Decision Reversed. Administrative Review: DHRM Ruling Request received 06/30/09; DHRM Ruling issued 01/26/10; Outcome: The 12/14/09 decision affirmed; Judicial Review: Appealed to Lunenburg County Circuit Court on 01/06/10; Outcome: Hearing to be reopened. Ruling issued 07/20/10.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9072

Hearing Officer Appointment: April 17, 2009
Hearing Date: May 20, 2009
Decision Issued: June 25, 2009

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment effective February 2, 2009, pursuant to a Group III Written Notice issued on February 2, 2009 by Management of the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated February 26, 2009.

The hearing officer was appointed on April 17, 2009. The hearing officer scheduled a pre-hearing telephone conference call at 10:00 a.m. on April 20, 2009. The Grievant's Advocate, the Agency's Advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by her advocate, confirmed that she is challenging the issuance of the Group III Written Notice for the reasons provided in her Grievance From A and is seeking the relief requested in her Grievance Form A, including reinstatement and restoration of all salary and benefits. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on April 20, 2009 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Agency was represented by its advocate and the Grievant was represented by her advocate. 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 1-8 in the Agency's binder and Grievant's exhibits 1-6.[1]

In this proceeding, the hearing officer also issued a Decision Concerning Order for Documents and Witnesses, an Order for Production of Documents, a Protective Order and 21 Orders for Witnesses, all of which are incorporated herein by this reference.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE 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.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a correctional officer, previously employed by the Agency for approximately 12 years before the termination of her employment by the Agency.

2. Up until the disciplinary infraction (the "Infraction") which is the subject of this proceeding, the Grievant had no disciplinary history with the Agency. Throughout her employment, the Grievant has received very good annual performance evaluations, rating her at a minimum either "contributor" or "exceeds contributor," including her most recent performance evaluation where she received from her supervisors, as witnessed by their signatures on September 20, 2008, an overall earned rating of "Exceeds Contributor." GE 2 and AE 4.

3. At the time of the Infraction, the Grievant was employed at a level 2 medium security prison institution (the "Facility") where the inmates have no more than 20 years left to serve. At the Facility, the inmates reside in dormitories, not cells and are allowed considerably more movement around the housing units than would be the case if they were housed at higher security level prisons. Tape 4A.

4. On approximately December 3, 2007, the business office staff at the Facility alerted Sergeant M (the "Institutional Investigator") concerning a suspicious money order to a local newspaper by Inmate L ("L"). Tape 3B.

5. The Institutional Investigator began an internal investigation and placed a mail cover on L, allowing the Facility to intercept and check L's mail for any attempted wrongdoing. The suspicious money order related to a notice/announcement to the local newspaper accompanying the money order (the "Notice").

6. The Institutional Investigator copied L's Notice.

7. The Notice read as follows:

NOTICE

> Girl of my dreams,
>
> I say your name means "blind." You say it means "radiant." You're right, of course. But then, you usually are. You lift my spirit with joy and bring a smile to my face. As you celebrate your special day on December 16, remember: you're all that. . . and a bag of chips. You're a cynosure.
>
> You Know Who

AE 2, Attachment F3.

8. In his letter accompanying the money order and the Notice to the editor of the local newspaper, L asked the editor to publish the notice in the December 12, 2007 edition of the paper. AE 2, Attachment F2.

9. The Institutional Investigator allowed the money order, Notice, etc. to proceed to the local newspaper and the Facility also called on the assistance of the Office of the Inspector General ("Internal Affairs") because of the concern that Facility staff might be implicated. Special Agent T ("T") was assigned to the investigation by Internal Affairs. The Notice eventually was published in the local paper, as L requested. AE 3, Attachment K1.

10. The Institutional Investigator and T began to work together on the investigation. The Warden supplied the investigators with a list of staff and their respective birthdays in December, including the Grievant whose birthday is on December 16, and through this and other means, the investigators were able to deduce that the Grievant was the subject of the Notice. AE 3, Attachment L1.

11. On December 3, 2007, the Institutional Investigator conducted a search of L's personal property and lockers and confiscated numerous articles of contraband, including a large folder titled "Rachel" concerning the Grievant and her family.

12. L was fixated on the Grievant and went to extraordinary lengths to secretly collect information concerning the Grievant and her family, including writing to his cousin to solicit his assistance and devising elaborate schemes to hide the efforts from the Facility. AE 2, Attachments G1-3.

13. L was placed in "special housing" or a segregation unit on December 27, 2007 for the offense of "possession of personal information." AE 3, Attachment I8. L was subsequently placed in general detention "for investigation for possible threat to

the orderly operation of this institution." (AE 3, Attachment M) and was ultimately transferred to a higher security level facility.

14. The Grievant admits that she knew of the Notice and that L wrote the Notice and placed the Notice in the local newspaper for her. The Grievant also had admitted that she and L discussed the Notice.

15. The Grievant states that she did not report the Notice and L's actions to her supervisors because it was no big deal.

16. In the context used in the Notice, the word "cynosure" means the center of attraction or attention. See, e.g., Webster's Ninth New Collegiate Dictionary (© 1985).

17. When interviewed on March 10, 2008, the Grievant told T and the Institutional Investigator that she was tired of rumors pertaining to her and L. See also, AE 2, Attachment B2.

18. The Grievant has also admitted that she engaged in conversations with L regarding her school-age child, her adult daughter who works at a different correctional institution and her plans regarding nursing.

19. Pursuant to her Conditions of Employment the Grievant was required to familiarize herself with all applicable procedures and post orders and she was required to acknowledge in writing receipt of a copy of Rules Governing Employees' Relationships with Inmates, Probationers, and Parolees. AE 8.

20. Throughout her employment the Grievant has received continued mandated in-service training regarding the prohibition on fraternization, including recent warnings in 2007 and 2008 about offender manipulations, con games, etc. AE 5.

21. There was no romantic relationship between the Grievant and L.

22. There was no relationship of friendship between the Grievant and L.

23. L is not credible.

24. The Grievant and her family are well known in the surrounding local community in which the Facility is located.

25. The Grievant's father died on May 27, 2008 and L, who by this time had been transferred to a more secure facility, placed a notice in a local newspaper expressing his condolences to the Grievant and her family. The Grievant promptly reported this to the Institutional Investigator.

26. In approximately 1999/2000, a counselor at the Facility (the "Counselor"), was informed by L that L was in love with the Grievant. The Counselor did not report this to anyone at the Facility until she informed the Grievant in July 2008. The Counselor testified that in all her years of work this was the only occasion on which an inmate had informed her that he was in love with a correctional officer.

27. The Facility and the local newspaper have published birth dates of Agency employees.

28. In approximately 2006, a different inmate ("Inmate M") exposed himself to the Grievant at the Facility. The Grievant wrote up a charge and took the matter up with her supervisor at the time, Captain W. Captain W told the Grievant that he would talk to Inmate M but that no formal charges against Inmate M should result. Captain W has since left the Facility.

29. L is obviously internet savvy and was able to access the internet through his work at the Facility's library. See, e.g., Tab 2, Attachments G2-3.

30. An inmate T was paroled on February 13, 2006 and came in to play on the Facility's softball team in July 2006. Tape 5A.

31. Under the facts and circumstances presented in this proceeding and concerning his mitigation analysis, the hearing officer finds that the termination of the Grievant's employment exceeded the limits of reasonableness for the reasons provided below.

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 Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1. 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.

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, 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.*

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group III offense, as asserted by the Department.

> THIRD GROUP OFFENSES (GROUP III).
>
> A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

B. *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*

26. Fraternization or non-professional 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 Director on a case by case basis (*see Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders*).

Department Operating Procedure Number 135.1. AE 7.

Department Operating Procedure Number 130.1 provides in part as follows:

> **Fraternization** - The act of, or giving the appearance of, association with offenders, or their family members, that extend to unacceptable, unprofessional and prohibited behavior. Examples include excess 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. . .

V. IMPROPRIETIES: NON-PROFESSIONAL ASSOCIATION

A. *Fraternization.* 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.

B. *Improprieties.* 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*). A "fraternization" brochure has been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies (*see Attachment #1*).

C. *Interactions*. While performing their job duties, employees are encouraged to interact with persons under DOC supervision on an individual and professional level to the extent necessary to further the Department's goals. Interactions shall be limited to the employee's assigned job duties.

VII. EMPLOYEE AND SUPERVISORY REPORTING RESPONSIBILITIES

A. Employee Responsibilities - In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.

AE 6.

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 definition of "fraternization" under Agency O.P. Number 130.1 is extremely broad and the hearing officer agrees with the Agency that the Grievant's failure to report the Notice which L placed in a local newspaper creates, at least, "the appearance of" impropriety. The hearing officer agrees with the Warden that a plain reading of the Notice reveals that it is extraordinary in that it is very explicit in its expression of L's infatuation with the Grievant. L could at some time in the future have begun to broadcast to the world the fact that he published the Notice for the Grievant to express his extreme feelings, with impunity. Furthermore, the Grievant admitted that she discussed with L the Notice and other employee personal matters, including her children, a clear violation of the policy. 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 Group III offense.

However, the hearing officer finds that the termination of the Grievant's employment exceeded the limits of reasonableness for reasons which follow.

Firstly, there was no improper romantic relationship between the protagonists with the attraction and fixation coming from L alone. If left with too much freedom at the Facility, L represented the primary driving threat to the safety and operations of the Facility. Many witnesses testified about L's resourcefulness and unscrupulousness, especially when gathering information from all sources about the Grievant. In 1999/2000 L told the Counselor of his fixation with the Grievant. This was not reported even to the Grievant until July 2008. The Facility's semi-annual shakedowns missed L's voluminous collections of personal information concerning the Grievant and other staff when because of his comment to the Counselor he should have set off alarm bells at the Facility.

Inmate C's playing on the Facility's softball team within the policy's prohibited period of "180 days of the date following his or her discharge from Department custody or termination from supervision, whichever occurs last" is remarkable in and of itself. There was no evidence adduced at the hearing whether any Facility supervisor or employee was or was not disciplined regarding this matter. There was also some reference during the hearing to a bet by a warden with an inmate regarding the outcome of a softball game, with the loser having to perform push-ups, but for all the hearing officer can tell, this might have been only a hypothetical question (Tape 5B) and the hearing officer has ignored it for purposes of this decision.

The dismissal by Captain W of the Grievant's charge relating to the inmate indecent exposure was unwarranted and inappropriate when the Grievant did exactly what she should have in reporting the matter to her supervisor.

Supervisor after supervisor and witness after witness for the Grievant testified that they had always seen the Grievant act in a professional manner with appropriate demeanor around inmates. The Grievant's evaluations throughout have been very good over the course of 12 years and she has absolutely no prior disciplinary record. The threat presented by L who is clearly very intelligent and resourceful has finally been recognized by the Agency and he has been removed to a more secure environment where he can be more closely monitored. Despite some comments, the Grievant has clearly learned from the disciplinary process and promptly reported to the appropriate superior at the Facility L's published condolences regarding her father's demise.

Accordingly, after much consideration, the hearing officer hereby upholds the Group III Written Notice against the Grievant for the policy violation of fraternization but hereby mitigates the sanction and decides that the Grievant should be **REINSTATED** to the position she formerly held prior to termination or if the position no longer exists to an objectively similar position, with all incumbent rights at the time of removal. The hearing officer orders no back pay for the reasons provided below.

As part of the framework for making his decision, EDR requires the hearing officer to decide "whether there were mitigating circumstances justifying a reduction or removal of the

disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances." Rules VI B.

The hearing officer considered the aggravating circumstances specified below and after careful consideration decided that these circumstances were not quite sufficient to overcome the mitigating circumstances but were appropriate for the hearing officer to factor in concerning his decision not to award the Grievant any back pay.

Firstly, despite her training throughout and especially in 2007 and 2008, the Grievant claimed that L's publication of the Notice and her concomitant decision not to report it to any supervisor was no big deal. Many of the Grievant's own witnesses stressed that they were continually reminded not to discuss any personal business with inmates (children, family, etc.) When the Warden discussed the matter with the Grievant on January 29, 2009, amongst other things, the Grievant told the Warden L "will pay." AE 1. When the Warden asked the Grievant what she meant by this, the Grievant stated that L "best not show up on your door step and that [the Warden] could take that any way [the Warden] wanted to." AE 1.

Of course, the serious nature of the Grievant's disciplinary infractions in the context of a prison facility where security and safety of the public, staff and inmates alike are of paramount concern, also constitute a significant aggravating factor, as evidenced by the hearing officer's decision to uphold the Group III Written Notice issued by the Agency.

The hearing officer allowed one rebuttal witness not named on the Grievant's witness list to testify. This rebuttal witness is an assistant warden at a different facility and she testified primarily concerning her bad experiences regarding Internal Affairs in a disciplinary proceeding in which she was the grievant. The gist of this rebuttal testimony was that based on her experience as a grievant, Internal Affairs could not be trusted to conduct a fair investigation. This rebuttal witness admitted that she had no personal knowledge concerning Internal Affairs' investigation in this proceeding. The Grievant's Advocate also wanted to testify to essentially the same effect that Internal Affairs cannot be trusted. Similarly, the Grievant's advocate was not named on the Grievant's witness list exchanged pursuant to the parties' stipulated agreement reflected in the Scheduling Order. The Scheduling Order provided in part as follows:

EXCHANGE OF EXHIBITS AND WITNESS LISTS:

> The parties agreed that before 5:00 p.m. on Wednesday, May 13, 2009, the parties would exchange between them and deliver to the hearing officer their proposed exhibits and the names of their proposed witnesses. To clarify this direction, "exchange" as used herein means each party shall ensure that he or she delivers by hand, overnight courier or facsimile, his or her proposed exhibits and the names of his or her proposed witnesses to the other party. Each party is responsible for notifying its own witnesses and securing the attendance of their witnesses at the hearing. The parties further agreed that any party wanting the hearing officer to issue any Order for Witness or any Order for Documents should send to the hearing officer a written request, specifying the name and

> address of any witness or custodian of records and documents requested, as soon as possible but, in any event, to be received by the hearing officer no later than 5:00 p.m. on Thursday, April 30, 2009
>
> The exhibits should be marked and tabbed and in a notebook for easy reference at the hearing. **Please remember that each party should also provide an extra set of witness exhibits if the party expects to question any witness concerning the exhibits.**

The Supreme Court of Virginia looks with favor upon the use of stipulations and other pre-trial (or in this proceeding, pre-hearing) techniques which are designed to expedite the trial, narrow the issues or encourage settlement of litigation. *McLaughlin v. Gholson*, 210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties' stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing technique. The parties themselves agreed to abide by the deadlines they stipulated to and the Supreme Court of Virginia's approach is to bind the parties to their stipulations so as not to violate the sanctity of the doctrine of freedom of contract and so as not to violate fundamental principles of fairness, notice and due process.

In *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Virginia Supreme Court specifically left open the question whether the trial judge in that case even had the discretion to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court's pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order.

EDR does not attach the same favor to stipulated deadlines as the Virginia Supreme Court.

> In **Ruling No. 2006-1387**, the EDR Director held that hearing officers may not exclude evidence as a penalty:
>
> > By statute, hearing officers have the duty to receive probative evidence and to exclude only evidence which is irrelevant, immaterial, insubstantial, privileged, or repetitive. Thus, where a grievant or agency seeks to introduce probative evidence at hearing, but has previously failed to identify the evidence in accordance with the hearing officer's prehearing orders, the hearing officer must nevertheless admit the evidence, but in the interests of due process, must ensure that the opposing party

> is not prejudiced by the dilatory proffer of evidence, for instance by adjourning the hearing to allow the opposing party time to respond.
>
> *See also* **Ruling No. 2006-1290** ("hearing officers *must* admit relevant evidence, as long as it is not also immaterial, insubstantial, privileged, or repetitive.")

While EDR's approach to stipulated deadlines and admission of evidence may not be the same as that of the Virginia Supreme Court, it is not totally open-ended. EDR Ruling No. 2006-1171 would appear to apply to the present proceeding.

> In **Ruling No. 2006-1171**, the EDR Director found that a hearing officer did not fail to comply with the grievance procedure where he excluded the testimony of the grievant's representative:
>
> > Mr. B [the representative] was not a party. Thus, Mr. B could act as the grievant's representative (and remain present in the hearing room during the entire hearing) or he could act as her witness (and remain present in the hearing room for his testimony only), but he could not do both. By electing to act as the grievant's representative, Mr. B foreclosed his ability to testify on the grievant's behalf.

In any event, the Grievant's advocate did make an offer of proof or proffer on the record for any reviewing person.

In this proceeding, the hearing officer finds that the investigation by T was independent, thorough and credible. The involvement of the other special agent, her supervisor, was peripheral and there was nothing nepharious or untoward with T's supervisor signing the report on her behalf: he indicated this on the face of the report and she gave him her full permission.

DECISION

The hearing officer upholds the Group III Written Notice issued by the Agency against the Grievant for fraternization, the Agency having sustained its evidence of proof in this regard. However, the hearing officer decides that the Agency's sanction of termination of the Grievant's employment under the facts and circumstances presented exceeded the limits of reasonableness. The hearing officer decides that the Grievant should be **reinstated** to the position she previously held prior to termination or if the position no longer exists to an objectively similar position, with incumbent rights at the time of removal. The hearing officer orders no back pay.

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, Main Street Centre, 600 East Main Street, Suite 301, 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 U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9072

Hearing Officer Appointment: April 17, 2009
Hearing Date: May 20, 2009
Original Decision Issued: June 25, 2009
Review Decision Issued: August 5, 2009

ISSUES

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII):

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 ("DHRM"). 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 the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing 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, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

DECISION

In her request to reconsider the decision, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request.

Hearing officers are authorized to make "findings of fact as to the material issues in the case" (*Va. Code § 2.2-3005.1(C))* and to determine the grievance based "on the material issues and grounds in the record for those findings." *Grievance Procedure Manual § 5.9.*

In cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. *Rules for Conducting Grievance Hearings § VI(B).*

Accordingly, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances. *Grievance Procedure Manual § 5.8.* Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer concerning those findings.

In making her arguments, the Grievant appears to contest the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. *Rules for Conducting Grievance Hearings § VI(B).*

Based upon a reconsideration of the hearing record, including his notes, exhibits and certain tapes of the hearing, the hearing officer is satisfied that sufficient evidence supports the hearing officer's decision. The Grievant makes two (2) main points in her request for reconsideration. The Grievant argues that there is no evidence that the Grievant ever discussed any personal matters with L. To respond briefly to this argument, the Grievant admits, amongst other things, that she was aware of the article L put in the paper about her birthday, that she was mad with him for putting the article in the paper, that she discussed the article with him and that she did not report it. Tape 6A. Special Agent T testified that the Grievant admitted during her initial interview that there were some brief and general conversations between the Grievant and L about her daughter after L had approached her concerning articles about her daughter in the local newspaper. Tape 2B.

At the hearing, on cross-examination, the Grievant admitted that her birthday is personal, that she discussed nursing and wanting to be a nurse with L and that she had discussed her daughter playing basketball with L. Tape 6A. *See also*, Tape 4A concerning the testimony of the Institutional Investigator relating to the Grievant's and L's discussions about nursing.

Concerning the Grievant's second point, the hearing officer has the following additional comments. 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 (the "SOC") are contained in the Operating Procedure Number 135.1. 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.

Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group III offense, as asserted by the Department.

> THIRD GROUP OFFENSES (GROUP III).
>
> C. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
>
> D. *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*
>
> 26. Fraternization or non-professional 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 Director on a case by case basis (*see Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders*).

Department Operating Procedure Number 135.1. AE 7.

Department Operating Procedure Number 130.1 provides in part as follows:

> **Fraternization** - The act of, or giving the appearance of, association with offenders, or their family members, that extend to unacceptable, unprofessional and prohibited behavior. Examples include excess 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. . .

V. IMPROPRIETIES: NON-PROFESSIONAL ASSOCIATION

D. *Fraternization.* 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.

E. *Improprieties.* 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*). A "fraternization" brochure has been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies (*see Attachment #1*).

F. *Interactions*. While performing their job duties, employees are encouraged to interact with persons under DOC supervision on an individual and professional level to the extent necessary to further the Department's goals. Interactions shall be limited to the employee's assigned job duties.

VII. EMPLOYEE AND SUPERVISORY REPORTING RESPONSIBILITIES

A. Employee Responsibilities - In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.

AE 6.

The Department's SOC have already received a preliminary review from DHRM and are presumed to be valid.

This hearing officer is required to use the standards and policies of the employing agency. This hearing officer cannot substitute the standards of another agency when deciding a case. This is not to say that only *agency* policy should be considered by this hearing officer because there is also state policy promulgated by DHRM. Agencies "are authorized to develop human resource policies that do not conflict with state policies or procedures." DHRM Policy 1.01. Such agency specific policies may be more restrictive than DHRM policy, so long as they do not conflict with DHRM policy. *See* DHRM Ruling re: Case # 5610. Furthermore, agencies are encouraged to seek guidance and assistance from DHRM when developing agency-specific policies or guidelines. DHRM Policy 1.01. Thus, while agency policies are generally presumed to comport with DHRM policy, if the hearing officer finds a conflict between DHRM and agency policy, the hearing officer must confine his policy deliberations to DHRM policy only.

EDR requires that an issue be raised on the Grievant's Form A in order for it to be qualified before the hearing officer for decision. Under the *Rules for Conducting Grievance Hearings* (the "Rules") § I, only issues qualified by the agency head, the EDR Director, or the Circuit Court may be decided by the hearing officer. "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court **cannot be remedied through a hearing**." Rules § 1 (emphasis supplied).

In her Ruling Number 2007-1409 dated September 21, 2006, at page 7, the Director appropriately noted the correlation between the Written Notice and the Form A:

> (Only the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.) **This standard is complementary to the burden placed on grievants in that only those grounds asserted on a grievant's Form A will be permitted to proceed to hearing.** (Emphasis supplied.)

The policy does not state that it ceases to apply because the Agency played some role in the facilitation of the publication. In this regard, at the time that the Agency released the intercepted letter back into the mail, the Agency had not yet identified the Grievant as the subject of L's praise. Accordingly, because the issue concerning the invalidity of the policy or the asserted conflict with DHRM Policy No. 1.60 was not raised on the Form A, the hearing officer declines to take up this issue in any greater detail while recognizing also that it might more appropriately be addressed by DHRM.

Finally, the hearing officer will just note that any agency by adopting such an extremely broad policy, particularly where "employees are encouraged to interact with persons under DOC supervision on an individual and professional level to the extent necessary to further the Department's goals" (AE 6), it potentially makes it easier for grievants to successfully argue mitigation because of disparate treatment, lack of notice, etc., as was the case in this proceeding.

For the reasons provided herein, the hearing officer hereby denies the grievant's request for reconsideration directed to him and hereby affirms his decision that the Agency has met its burden of proving by a preponderance of the evidence that the issuance of the Group III Written Notice was warranted and appropriate but subject to the hearing officer's mitigation decision reinstating the Grievant.

APPEAL RIGHTS

The hearing officer attaches hereto and incorporates herein Section VII of the Rules.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9072

Hearing Officer Appointment: April 17, 2009
Hearing Date: May 20, 2009
Original Decision Issued: June 25, 2009
Review Decision Issued: August 5, 2009
Remand Decision Issued: December 14, 2009

REMAND DECISION

The Director of the Virginia Department of Employment Dispute Resolution ("EDR") has remanded this proceeding to the hearing officer for the hearing officer to reconsider and clarify his previous decision concerning mitigation issued June 25, 2009 in EDR Case No. 9072 (the "Previous HO Decision"). Administrative Review of Director, Ruling Number 2010-2368 dated October 27, 2009 (the "Remand").

For the reasons that follow and based on the Director's analysis and instructions in the Remand, the hearing officer reverses his previous mitigation decision concerning reinstatement of the Grievant's employment and now decides that he upholds the Agency's termination of the Grievant's employment.

In *Tatum v. Virginia Dept. of Agriculture*, 41 Va.App. 110, 582 S.E.2d 452 (2003), the Court of Appeals of Virginia reversed a decision of Judge Hughes of the Circuit Court of the City of Richmond and upheld the decision of an administrative hearing officer who sustained a Group III Written Notice while ordering reinstatement but not back pay. In *Tatum*, the Court of Appeals decided that "[t]he adjudicative acts of the hearing officer were grounded in and consistent with the provisions of Code §§ 2.2-3003 and 2.2-3005, as well as the Rules for Conducting Grievance Hearings, VI(B)." *Tatum*, 41 Va.App. 110, 124, 528, S.E.2d 452, 459 (2003).

In his *Decision of Hearing Officer* for EDR Case Number 5331 issued January 2, 2002 (the "Decision"), the different hearing officer who decided that case had only one (1) very short paragraph consisting of two (2) sentences explaining his mitigation analysis:

> *Grievant's favorable work performance and approximately nine years of employment with the Commonwealth form a sufficient*

> *basis to reduce Grievant's discipline from a Group III Written Notice with removal to a Group III Written Notice without removal. The Hearing Officer will not award back pay because the Group III Written Notice is upheld and because Grievant also received a Group II Written Notice.*

Decision at 6.

In short, the Court of Appeals reversed the Circuit Court because the adjudicative acts of the hearing officer in that administrative proceeding were not contradictory to law. Before the matter even got to Circuit Court, the Agency challenged the hearing officer's mitigation of the discipline before both the Director of EDR and the Director of the Department of Human Resource Management ("DHRM"). In his *Compliance Ruling of Director*, No. 2002-008 of March 1, 2002 (the "Compliance Ruling"), the Director of EDR made short shrift of the Agency's challenge to the hearing officer's mitigation decision:

> *Although the hearing officer gave the active Group II Written Notice less weight than the agency may have, he was entirely within his authority under the grievance procedure to do so in determining whether to uphold or reverse the grievant's termination. As expressly provided in the Rules for Conducting Grievance Hearings, the hearing officer "may consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct", and "may order that the employee be reinstated while upholding the level of the Written Notice" before him. That is what the hearing officer did in this case. The agency's request for administrative review to this Department, when examined, simply contests the weight that the hearing officer accorded to the evidence, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision.*

Compliance Ruling, at 3.

EDR precedent has evolved and subsequent to the *Tatum* mitigation decision, understandably, EDR has 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.* In both *Tatum* (a Group III offense of intentionally falsifying state records) and in this

proceeding (a Group III offense of fraternization) the offenses are extremely serious, normally leading to discharge. Accordingly, the Director in the Remand has appropriately instructed the hearing officer to afford only minimal weight to the Grievant's otherwise positive work record. Remand at 10. The hearing officer has done this in conducting his reconsidered mitigation analysis, including weighing the combined mitigating factors and countervailing aggravating factors, etc.

In his Previous HO Decision, the hearing officer did not consider any one of the mitigating factors in his mitigation analysis, in and of itself, to be sufficient to overcome the Agency's discipline of discharge but rather previously found that the enumerated factors in the aggregate militated against a finding, under the facts and circumstances of the proceeding, that the Agency's discipline was within the permissible zone of reasonableness.

The hearing officer read the applicable EDR rules to allow a consideration of the salient mitigating factors in the aggregate and the hearing officer has not discovered any rulings or precedent from EDR which would preclude such an approach. However, even when adopting this cumulative approach, previously, the hearing officer, "after careful consideration decided that [the aggravating] circumstances were not quite sufficient to overcome the mitigating circumstances. . ." Accordingly, the hearing officer in his Previous HO Decision considered it a close call to reinstate the Grievant. Based on EDR's analysis and instructions in the Remand, the hearing officer no longer considers this decision of weighing the mitigating and aggravating factors a close call and decides that he must uphold the Agency's discipline of termination for the reasons herein.

Clearly, the level of scrutiny by EDR of a hearing officer's decision to mitigate discipline is much stricter than was the case during the *Tatum* era. This hearing officer in the Previous HO Decision made numerous findings (*see, e.g.*, Findings of Fact paragraphs 1, 2, 26, 27, 28, 29, 30, 31) pertaining to his decision to mitigate and about two (2) additional pages of analysis and discussion (pages 9-10).

At the time of the *Tatum* decision, the *Rules for Conducting Grievance Hearings* (effective July 1, 2001) (the "Old Rules") provided the following concerning mitigation:

> 1. Mitigating and Aggravating Circumstances: The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," which the *Standards of Conduct* describes 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." The *Standards of Conduct* also allows agencies to consider aggravating circumstances that would support the level of discipline issued.
>
> Likewise, the hearing officer may consider mitigating or aggravating circumstances to determine whether the level of

discipline was too severe or disproportionate to the misconduct. Should the hearing officer find it appropriate to reduce the level of discipline, the hearing officer may do so without citing one of the specific offenses listed in the *Standards of Conduct*; however, he must identify in general terms the misconduct that occurred.

In considering mitigating circumstances, the hearing officer must also consider management's right to exercise its good faith business judgment in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.

Examples of "mitigating circumstances" (though not specifically referenced as such in the *Standards of Conduct*) could include:

- Notice: Did the employee have notice of the existence of the rule, how the agency interprets the rule, and the possible consequences of not complying with it? An employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation has been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

- Consistent Application: Has the supervisor been consistent? The *Standards of Conduct* states that "[m]anagement should apply corrective actions consistently, while taking into consideration the specifics of each individual case."

- Improper Motive: Was the discipline free of improper retaliatory or discriminatory motives?

Old Rules, page 12, Section VI(B)(1).

Both the grievance statute and the EDR rules were amended subsequent to the *Tatum* decision. The legislature is presumed to know the law when it acts. Accordingly, in all likelihood, the changes to the grievance procedure and to mitigation of discipline by an EDR hearing officer, in particular, were made at least in part in response to the *Tatum* decision. These

changes and EDR's rulings after the *Tatum* decision, as evidenced by the Remand, have obviously imposed a much stricter standard in order for a hearing officer to overturn an Agency's decision concerning the level of discipline meted out, especially where the hearing officer finds that the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III Offense, as was the case in this proceeding. Previous HO Decision, at 8.

DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007.

Regardless of whether the agency considers mitigation, EDR has ruled that under Va. Code § 2.2-3005, this hearing officer is charged with the duty to "[r]eceive 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". EDR's *Rules for Conducting Grievance Hearings* 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. *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. EDR Ruling #2008-1832 at 8. In this proceeding, the Department did consider mitigating and aggravating factors in disciplining the Grievant. The Warden, in particular, found the Grievant's refusal to even acknowledge/understand that there was a problem a huge impediment to any reduction in the level of discipline. Tape 4A. Upon reconsideration, the hearing officer decides that he did not sufficiently defer to the Warden's assessment in this regard and now appropriately factors this item into his present reconsideration.

Accordingly, because the Department assessed mitigating and aggravating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

The hearing officer now proceeds to readdress and, where appropriate, clarify his assessment of certain relevant mitigating factors for which EDR sought clarification in its

Remand. As EDR did not take issue with the hearing officer's assessment of any aggravating factors (Previous HO Decision at 10), the hearing officer has not readdressed aggravating factors.

Sergeant M testified that the voluminous newspaper cuttings in possession of L concerning the Grievant, the Warden and others constituted contraband according to Agency policy. Sergeant M also testified that the Facility should have seen the contraband when it conducted its semi-annual shakedowns of L's cell. The Warden testified that L was in and out of segregation from 1990-2001 and during this period received 5 or 6 institutional charges, of which four (4) required special attention. L was allowed to work in the library, where he had access to the internet. While the hearing officer understands the Director's points that "many prison inmates are unscrupulous," that "agency prohibitions against all forms of fraternization . . . are designed to prevent Agency employees from becoming victims of unscrupulous behavior" and that the Grievant received training throughout her employment on "offender manipulation, con games, etc.", the hearing officer still considers the Facility's admitted failures of not sooner discovering, recognizing and dealing with the threat posed by L as a mitigating factor.

Similarly, the Counselor testified that she was inexperienced and new at the Facility in 1999/2000 when L first told the Counselor that he was in love with the Grievant. Tape 5B. The Counselor testified that if what happened then had happened now, some ten (10) years later, the Counselor would "immediately" do an incident report to the Facility. Tape 5B. Again, the hearing officer considers this admitted failure by the Counselor to take preventative measures or even notify management of a highly unusual and potentially dangerous statement by an inmate as a mitigating factor in favor of the Grievant. The Counselor testified that in all her many years of experience, this was the only occasion on which an inmate has expressed his love for a correctional officer.

In his Previous HO Decision, the hearing officer did not consider the fact that Inmate T was paroled on February 13, 2006 and came back to play on the Facility's softball team in July 2006 as an example of the Facility's inconsistent application of discipline because the Grievant failed to prove "whether any Facility supervisor or employee was or was not disciplined regarding this matter." Previous HO Decision at 9. However, the hearing officer still considers this a mitigating factor for the following reason. Even in a best case scenario for the Facility where the hearing officer assumes that <u>everyone</u> who "fraternized" with Inmate T concerning the softball game was discharged, it strikes the hearing officer that this incident evidences a general laxness on the part of management of the Facility towards the strict Agency policy of absolutely prohibiting fraternization for the following reasons.

The policy strictly prohibits "[f]raternization or non-professional relationships between employees and offenders . . . 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." Department Operating Procedure No. 135.1; AE 7; Previous HO Decision at 7.

As the Grievant's advocate cogently pointed out and as the correctional officer witness from the Facility agreed, "[Inmate T] wasn't even out and he was back." Tape 5A. Furthermore,

Inmate T was back in a very visible role, as a teammate on the Facility's softball team. The hearing officer believes it is reasonable for him to assume that management knows what goes on in its Facility, including being aware that the Facility has a softball team and who publicly represents the Facility on the official softball team.

By contrast, the Grievant's transgressions were not nearly as public or visible. The poem was published by L anonymously, did not mention the name or identity of the Grievant as its target and is still only shown by the Agency to be known to the investigators, the Warden, L, the Grievant and possibly a few others. Similarly, the Grievant's discussions concerning personal matters with L are not shown by the Agency to be widely known and were only established by the Agency because the Grievant admitted them under interrogation from the Warden and investigators.

While the hearing officer still considers this item a mitigating factor, the hearing officer, adopting the stricter scrutiny utilized by EDR, has somewhat lessened its impact because the Grievant did not prove when she learned of Inmate T playing on the Facility's softball team. Obviously, it would have more probative worth if the Grievant was aware of the Inmate T softball episode before the time of her disciplinary infractions but this was not proven by the Grievant.

The hearing officer still considers as a mitigating factor the Captain's unwarranted and inappropriate dismissal of the Grievant's report to the Captain of an inmate's indecent exposure for the following reasons. While the hearing officer recognizes and accepts the Director's point that the hearing officer in the Previous HO Decision found that the Grievant's discussions of personal issues with Inmate L are a clear violation of policy and that this disciplinary offense is independent of the offense of failing to report, it was the Warden herself who testified:

> "She failed to report. This case is as much about what she failed to do as what she did do."

Tape 4A.

The Warden was clear that the disciplinary action against the Grievant was taken in large part because the Grievant failed to report the publication of the poem to management. Accordingly, the hearing officer considers management's failure to take any action concerning the antecedent indecent exposure reported by the Grievant to her supervisor as a mitigating factor.

The hearing officer has considered many mitigating factors, including those referenced herein and in the Previous HO Decision and decides for the reasons provided herein and based on EDR's Remand that he must reverse his previous decision of reinstating the Grievant and uphold her discharge by the Agency.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group III Written Notice, in discharging the Grievant 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:

4. **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.

5. **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.

6. **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, Main Street Centre, 600 East Main Street, Suite 301, 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:

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

4. 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 U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

January 26, 2010

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 9072. The grievant also requested a reconsideration of the decision by the hearing officer who did not change his decision based on his first reconsideration decision. The Department of Corrections requested an administrative review from the Department of Employment Dispute Resolution (EDR) which remanded the decision to the hearing officer to reconsideration mitigating factors in making his decision. Upon remand, the hearing officer reversed his decision in a second reconsideration decision. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

FACTS

The grievant was issued a Group III Written Notice and terminated from her employment, effective, February 2, 2009. She filed a grievance, and when she did not get the relief she through the management steps, she requested a hearing before a hearing officer. The hearing officer upheld the Group III Written Notice but reinstated her with no back pay.

The hearing officer set forth the facts of this case as following:

1. The Grievant was a correctional officer, previously employed by the Agency for approximately 12 years before the termination of her employment by the Agency.
2. Up until the disciplinary infraction (the "Infraction") which is the subject of this proceeding, the Grievant had no disciplinary history with the Agency. Throughout her employment, the Grievant has received very good annual performance evaluations, rating her at a minimum either "contributor" or "exceeds contributor," including her most recent performance evaluation where she received from her supervisors, as witnessed by their signatures on

September 20, 2008, an overall earned rating of "Exceeds Contributor." GE 2 and AE 4.

3. At the time of the Infraction, the Grievant was employed at a level 2 medium security prison institution (the "Facility") where the inmates have no more than 20 years left to serve. At the Facility, the inmates reside in dormitories, not cells and are allowed considerably more movement around the housing units than would be the case if they were housed at higher security level prisons. Tape 4A.
4. On approximately December 3, 2007, the business office staff at the Facility alerted Sergeant M (the "Institutional Investigator") concerning a suspicious money order to a local newspaper by Inmate L ("L"). Tape 3B.
5. The Institutional Investigator began an internal investigation and placed a mail cover on L, allowing the Facility to intercept and check L's mail for any attempted wrongdoing. The suspicious money order related to a notice/announcement to the local newspaper accompanying the money order (the "Notice").
6. The Institutional Investigator copied L's Notice.
7. The Notice read as follows:

NOTICE

> Girl of my dreams,
> I say your name means "blind." You say it means "radiant." You're right, of course. But then, you usually are. You lift my spirit with joy and bring a smile to my face. As you celebrate your special day on December 16, remember: you're all that. . . and a bag of chips. You're a cynosure.
> You Know Who

AE 2, Attachment F3.

8. In his letter accompanying the money order and the Notice to the editor of the local newspaper, L asked the editor to publish the notice in the December 12, 2007 edition of the paper. AE 2, Attachment F2.
9. The Institutional Investigator allowed the money order, Notice, etc. to proceed to the local newspaper and the Facility also called on the assistance of the Office of the Inspector General ("Internal Affairs") because of the concern that Facility staff might be implicated. Special Agent T ("T") was assigned to the investigation by Internal Affairs. The Notice eventually was published in the local paper, as L requested. AE 3, Attachment K1.
10. The Institutional Investigator and T began to work together on the. The Warden supplied the investigators with a list of staff and their respective birthdays in December, including the Grievant whose birthday is on December 16, and through this and other means, the investigators were able to deduce that the Grievant was the subject of the Notice. AE 3, Attachment L1.
11. On December 3, 2007, the Institutional Investigator conducted a search of L's personal property and lockers and confiscated numerous articles of contraband, including a large folder titled "Rachel" concerning the Grievant and her family.

12. L was fixated on the Grievant and went to extraordinary lengths to secretly collect information concerning the Grievant and her family, including writing to his cousin to solicit his assistance and devising elaborate schemes to hide the efforts from the Facility. AE 2, Attachments G1-3.
13. L was placed in "special housing" or a segregation unit on December 27, 2007 for the offense of "possession of personal information." AE 3, Attachment I8. L was subsequently placed in general detention "for investigation for possible threat to the orderly operation of this institution." (AE 3, Attachment M) and was ultimately transferred to a higher security level facility.
14. The Grievant admits that she knew of the Notice and that L wrote the Notice and placed the Notice in the local newspaper for her. The Grievant also had admitted that she and L discussed the Notice.
15. The Grievant states that she did not report the Notice and L's actions to her supervisors because it was no big deal.
16. In the context used in the Notice, the word "cynosure" means the center of attraction or attention. See, e.g., Webster's Ninth New Collegiate Dictionary (© 1985).
17. When interviewed on March 10, 2008, the Grievant told T and the Institutional Investigator that she was tired of rumors pertaining to her and L. See also, AE 2, Attachment B2.
18. The Grievant has also admitted that she engaged in conversations with L regarding her school-age child, her adult daughter who works at a different correctional institution and her plans regarding nursing.
19. Pursuant to her Conditions of Employment the Grievant was required to familiarize herself with all applicable procedures and post orders and she was required to acknowledge in writing receipt of a copy of Rules Governing Employees' Relationships with Inmates, Probationers, and Parolees. AE 8.
20. Throughout her employment the Grievant has received continued mandated in-service training regarding the prohibition on fraternization, including recent warnings in 2007 and 2008 about offender manipulations, con games, etc. AE 5.
21. There was no romantic relationship between the Grievant and L.
22. There was no relationship of friendship between the Grievant and L.
23. L is not credible.
24. The Grievant and her family are well known in the surrounding local community in which the Facility is located.
25. The Grievant's father died on May 27, 2008 and L, who by this time had been transferred to a more secure facility, placed a notice in a local newspaper expressing his condolences to the Grievant and her family. The Grievant promptly reported this to the Institutional Investigator.
26. In approximately 1999/2000, a counselor at the Facility (the "Counselor"), was informed by L that L was in love with the Grievant. The Counselor did not report this to anyone at the Facility until she informed the Grievant in July 2008. The Counselor testified that in all her years of work this was the only

occasion on which an inmate had informed her that he was in love with a correctional officer.

27. The Facility and the local newspaper have published birth dates of Agency employees.
28. In approximately 2006, a different inmate ("Inmate M") exposed himself to the Grievant at the Facility. The Grievant wrote up a charge and took the matter up with her supervisor at the time, Captain W. Captain W told the Grievant that he would talk to Inmate M but that no formal charges against Inmate M should result. Captain W has since left the Facility.
29. L is obviously internet savvy and was able to access the internet through his work at the Facility's library. See, e.g., Tab 2, Attachments G2-3.
30. An inmate T was paroled on February 13, 2006 and came in to play on the Facility's softball team in July 2006. Tape 5A.
31. Under the facts and circumstances presented in this proceeding and concerning his mitigation analysis, the hearing officer finds that the termination of the Grievant's employment exceeded the limits of reasonableness for the reasons provided below.

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 Department's Standards of Conduct

(the "SOC") are contained in the Operating Procedure Number 135.1. 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.

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, 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.*
Pursuant to the SOC, the Grievant's infraction could clearly constitute a Group III offense, as asserted by the Department.

THIRD GROUP OFFENSES (GROUP III).

A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
B. *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*
26. Fraternization or non-professional 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 Director on a case by case basis (*see Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders*).

Department Operating Procedure Number 135.1. AE 7.

Department Operating Procedure Number 130.1 provides in part as follows:

> **Fraternization** - The act of, or giving the appearance of, association with offenders, or their family members, that extend to unacceptable, unprofessional and prohibited behavior. Examples include excess 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. . .

V. IMPROPRIETIES: NON-PROFESSIONAL ASSOCIATION

A. *Fraternization*. 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.

B. *Improprieties*. 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*). A "fraternization" brochure has been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies (*see Attachment #1*).

C. *Interactions*. While performing their job duties, employees are encouraged to interact with persons under DOC supervision on an individual and professional level to the extent necessary to further the Department's goals. Interactions shall be limited to the employee's assigned job duties.

VII. EMPLOYEE AND SUPERVISORY REPORTING RESPONSIBILITIES

A. Employee Responsibilities - In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations. AE 6.

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 definition of "fraternization" under Agency O.P. Number 130.1 is extremely broad and the hearing officer agrees with the Agency that the Grievant's failure to report the Notice which L placed in a local newspaper creates, at least, "the appearance of" impropriety. The hearing officer agrees with the Warden that a plain reading of the Notice reveals that it is extraordinary in that it is very explicit in its expression of L's infatuation with the Grievant. L could at some time in the future have begun to broadcast to the world the fact that he published the Notice for the Grievant to express his extreme feelings, with impunity. Furthermore, the Grievant admitted that she discussed with L the Notice and other employee personal matters, including her children, a clear violation of the policy. 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 Group III offense. However, the hearing officer finds that the termination of the Grievant's employment exceeded the limits of reasonableness for reasons which follow.

Firstly, there was no improper romantic relationship between the protagonists with the attraction and fixation coming from L alone. If left with too much freedom at the Facility, L represented the primary driving threat to the safety and operations of the Facility. Many witnesses testified about L's resourcefulness and unscrupulousness, especially when gathering information from all sources about the Grievant. In 1999/2000 L told the Counselor of his fixation with the Grievant. This was not reported even to the Grievant until July 2008. The Facility's semi-annual shakedowns missed L's voluminous collections of personal information concerning the Grievant and other staff when because of his comment to the Counselor he should have set off alarm bells at the Facility. Inmate C's playing on the Facility's softball team within the policy's prohibited period of "180 days of the date following his or her discharge from Department custody or termination from supervision, whichever occurs last" is remarkable in and of itself. There was no evidence adduced at the hearing whether any Facility supervisor or employee was or was not disciplined regarding this matter. There was also some reference during the hearing to a bet by a warden with an inmate regarding the outcome of a softball game, with the loser having to perform push-ups, but for all the hearing officer can tell, this might have been only a hypothetical question (Tape 5B) and the hearing officer has ignored it for purposes of this decision.

The dismissal by Captain W of the Grievant's charge relating to the inmate indecent exposure was unwarranted and inappropriate when the Grievant did exactly what she should have in reporting the matter to her supervisor. Supervisor after supervisor and witness after witness for the Grievant testified that they had always seen the Grievant act in a professional manner with appropriate demeanor around inmates. The Grievant's evaluations throughout have been very good over the course of 12 years and she has absolutely no prior disciplinary record. The threat presented by L who is clearly very intelligent and resourceful has finally been recognized by the Agency and he has been removed to a more secure environment where he can be more closely monitored. Despite some comments, the Grievant has clearly learned from the disciplinary process and promptly reported to the appropriate superior at the Facility L's published condolences regarding her father's demise.

Accordingly, after much consideration, the hearing officer hereby upholds the Group III Written Notice against the Grievant for the policy violation of fraternization but hereby mitigates the sanction and decides that the Grievant should be **REINSTATED** to the position she formerly held prior to termination or if the position no longer exists to an objectively similar position, with all incumbent rights at the time of removal. The hearing officer orders no back pay for the reasons provided below.

As part of the framework for making his decision, EDR requires the hearing officer to decide "whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances." Rules VI B.

The hearing officer considered the aggravating circumstances specified below and after careful consideration decided that these circumstances were not quite sufficient to overcome the mitigating circumstances but were appropriate for the hearing officer to factor in concerning his decision not to award the Grievant any back pay.

Firstly, despite her training throughout and especially in 2007 and 2008, the Grievant claimed that L's publication of the Notice and her concomitant decision not to report it to any supervisor was no big deal. Many of the Grievant's own witnesses stressed that they were continually reminded not to discuss any personal business with inmates (children, family, etc.) When the Warden discussed the matter with the Grievant on January 29, 2009, amongst other things, the Grievant told the Warden L "will pay." AE 1. When the Warden asked the Grievant what she meant by this, the Grievant stated that L "best not show up on your door step and that [the Warden] could take that any way [the Warden] wanted to." AE 1.

DECISION

> The hearing officer upholds the Group III Written Notice issued by the Agency against the Grievant for fraternization, the Agency having sustained its evidence of proof in this regard. However, the hearing officer decides that the Agency's sanction of termination of the Grievant's employment under the facts and circumstances presented exceeded the limits of reasonableness. The hearing officer decides that the Grievant should be **reinstated** to the position she previously held prior to termination or if the position no longer exists to an objectively similar position, with incumbent rights at the time of removal. The hearing officer orders no back pay.
>
> Relevant policies include the Department of Human Resource Management's Policy No.1.60, Standards of Conduct, which "provides for the establishment and communication of employees' performance and procedures for evaluating employees' performance." The VSP has developed its own set of guidelines, similar to those as outlined in Policy 1.60, that govern communicating employee's performance and procedures for evaluating employees' performance.

After taking into consideration mitigating and aggravating circumstances, the hearing officer upheld the Group III Written Notice and reinstated the grievant without back pay. The DOC requested an administrative review form EDR. The EDR remanded the decision to the hearing officer and upon issuing his remanded decision, the hearing officer reversed his original decision and let the grievant remain terminated.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the grievant requested an administrative review from DHRM as a result of the hearing officer's original decision. That request, vague in its description of any policy issues, appears to be related to evidentiary matters. The grievant did not request an administrative review as a result of the hearing officer's remanded decision issued on December 14, 2009 and received by this Agency on December 22, 2009.

Therefore, the Department of Human Resource Management has no basis for disturbing this hearing decision.

_____

Ernest G. Spratley
Assistant Director, Office of Equal Employment Services

VIRGINIA:

IN THE CIRCUIT COURT OF LUNENBURG COUNTY

Appellant,

v. **Case No. CL10000001-00**

VIRGINIA DEPARTMENT OF CORRECTIONS, **Appellee.**

ORDER

This day came the parties, by counsel, upon ' motion to remand the grievance due to the failure of the Agency to provide the entire record to the Circuit Court pursuant to the requirements of Virginia Code § 2.2-3006(B).

Having heard arguments of counsel and review of the record, the Court finds that the Agency has failed to provide the entire record, specifically Tape 3 of the May 20, 2009 hearing before the hearing officer, to the Circuit Court in order that it can conduct its review pursuant to Virginia Code § 2.2-3006. The Court further finds that the entire record is indispensable for the Court's consideration of the review of the grievance.

The Court ORDERS that the ruling of the hearing officer is hereby set aside and the grievance is remanded to the Agency to conduct a *de novo* hearing in the above-styled matter.

ENTER: 7 / 20/2010

Circuit Court Judge

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