Issues: Group III Written Notice (failure to report security threat, fraternization) and Termination; Hearing Date: 06/19/09; Decision Issued: 06/23/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9087; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 07/06/09; Reconsideration Decision issued 07/16/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/16/09; EDR Ruling #2010-2366 issued 09/04/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/06/09; DHRM Ruling issued 10/08/09; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9087

Hearing Date: June 19, 2009
Decision Issued: June 23, 2009

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on February 23, 2009 for:

> Failure to Report a Security Threat and Fraternization of an Inmate; On January 23, 2009, while assigned as the Yard Officer, [the Grievant] spoke with an inmate in the Segregation unit. The conversation was recorded on the intercom recording system. The inmate relayed to [the Grievant] that he put a "hit" out on the yard and [the Grievant] failed to report this security threat. As well, the tone, mood, location, subject matter, and failure to report the conversation, is indicative of fraternization with an inmate. [1]

Pursuant to the Group III Written Notice, the Grievant was terminated on February 23, 2009. On March 16, 2009, the Grievant timely filed a grievance to challenge the Agency's actions. On May 4, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 19, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Counsel for Grievant
Witnesses

[1] Agency Exhibit 1, Tab 1

ISSUE

1. Did the Grievant's actions constitute a security threat to the Institution and/or fraternization with an inmate?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

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

FINDINGS OF FACT

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

The Agency provided the Hearing Officer with a notebook containing twenty (20) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

On January 23, 2009, the Grievant was the Yard Officer and she was operating under Post Order number 18. [2] One of the specific Post Duties under Post Order 18, is for the Yard Officer to ensure Count Sheets are collected and forwarded to the Master Control for verification in a timely manner. [3]

Pursuant thereto, the Grievant entered the Segregation Unit at 5:53 p.m. on January 23, 2009 and departed that Unit at 6:04 p.m. [4] The Grievant was in the Segregation Unit for approximately 11 minutes. During that time she walked from one end of the Unit to the other, accompanied by another Officer. She was then seen walking back through the Unit and stopped in front of Cell 7 and spent approximately 2 minutes and 15 seconds conversing with the Inmate housed in that cell. An audio recording of this conversation as well as a video of the Grievant were introduced at Agency Exhibit 1, Tab 4 and Agency Exhibit 1, Tab 5. The video in fact showed the Grievant walking from one end of the Segregation Unit to the other while she was accompanied by a fellow Officer and then it showed her returning to a particular Inmate's cell. The Hearing Officer timed her presence in front of this one cell at approximately 2 minutes and 15 seconds. The audio tape was essentially unintelligible. The Agency and the Grievant attempted to identify what was being said. The receiver that was picking up this conversation was located in the Inmate's cell and the Grievant was outside of that cell. The cell appears to be a solid walled cell with only a window and a slot for introducing food. The only identifiable language of interest that the Hearing Officer could hear was that the Inmate told the Grievant that he had "put a hit out on the yard." [5]

Earlier in the day of January 23, 2009, this particular Inmate was removed from his cell by a Correctional Sergeant at 1:10 p.m. It appears that he was returned to his cell at 1:41 p.m. on that same day. [6] A witness for the Agency testified that a Lieutenant told her that there was a "hit out on the yard," prior in time to the Grievant having her conversation with the Inmate. Therefore there is at least a reasonable belief that the Agency was on notice of this "hit," prior to the Inmate relating that fact to the Grievant. The Grievant, in her testimony, stated that she "assumed the Institution already knew that the Inmate had put a 'hit' out on the Yard." The Grievant also acknowledged this fact in her response to the Second Resolution Step. [7]

Policy 135.1, Standards of Conduct, is the appropriate policy regarding security in this matter. Policy 135.1(VI)(B) states as follows:

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[2] Agency Exhibit 1, Tab 8, Page 7
[3] Agency Exhibit 1, Tab 8, Page 8
[4] Agency Exhibit1, Tab 10, Page 5
[5] Agency Exhibit 1, Tab 4
[6] Agency Exhibit 1, Tab 10, Page 4
[7] Agency Exhibit 1, Tab 20, Page 4

> Supervisors should be aware of inadequate or unsatisfactory work performance or behavior of employees and attempt to correct the performance or behavior immediately. Depending on the severity of the situation, corrective action may be accomplished through informal or formal means. Informal corrective action may take the form of a counseling session or issuance of a counseling memorandum or letter. Formal disciplinary action is accomplished by the issuance of a written notice form. **While it is anticipated that most performance and behavior problems can be resolved through a counseling process, counseling is not a prerequisite to taking formal disciplinary action.** (Emphasis added) [8]

Policy 135.1(XII) sets forth Third Group Offenses for which a first occurrence normally would warrant removal. Policy 135.1(XII)(B)(7) sets forth as an example a violation of safety rules where there is a threat to physical harm. [9] Policy 135.1(XII)(B)(16) sets forth that refusal to obey instructions that could result in a weakening of security warrants removal. [10]

The Hearing Officer finds that the failure to report a potential "hit on the Yard" is a serious offense. Regardless of whether other Agency personnel were aware of this threat, it was incumbent on the Grievant to see to it that she reported the threat. This is something that a trained Officer simply could not assume was already known and did not need reporting. The Inmate could have not told the truth regarding the Agency's prior knowledge of the "hit on the Yard." Discretion mandates that this type of information always be reported to the proper authorities regardless of the assumption of prior knowledge.

The Hearing Officer finds that the Agency has bourne its burden of proof regarding the charge of failure to report a security threat.

The Agency argued that the 2 minute and 15 second conversation with the Inmate amounted to Fraternization. Fraternization is defined in Policy 130.1, Rules of Conduct Governing Employees Relationships with Offenders. Therein it is defined as follows:

> The act of, or giving the appearance of, association with offenders or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders. [11]

[8] Agency Exhibit 1, Tab 19, Page 4
[9] Agency Exhibit 1, Tab 19, Page 9
[10] Agency Exhibit 1, Tab 19, Page 9
[11] Agency Exhibit 1, Tab 18, Page 1

The Agency chose not to have the audio tape examined by experts who may or may not have had the ability to glean more from it than the Hearing Officer could at the hearing. It is at least possible that a transcript prepared by experts who could eliminate much of the extraneous noise would have helped the Hearing Officer in determining whether or not the conversation indicated that the Grievant was associating with the Inmate in an unacceptable, unprofessional or prohibited manner. Unfortunately, this was not done. The Hearing Officer determines that a 2 minute and 15 second conversation does not rise to the level of excessive time or attention given to an Offender. The Agency offered as evidence a video of this Grievant having a conversation on December 5, 2008 with the same Inmate involved in the conversation of January 23, 2009. At the hearing, the Agency did not play that video and all of the Agency witnesses conceded that there had been no counseling or conversations with the Grievant that the December conversation may have given an appearance of fraternization.

The Hearing Officer finds that the Agency has not bourne its burden of proof regarding the charge of fraternization.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [12] Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph and, the Hearing Officer also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof for the Grievant's failure to report a security threat and that the Group III Written Notice was validly and properly issued and that termination was proper.

[12] Va. Code § 2.2-3005

APPEAL RIGHTS

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

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

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

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

Director
Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

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

You may request a judicial review if you believe the decision is contradictory to law.[13] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[14]

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

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

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

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William S. Davidson
Hearing Officer

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
In re:

Case No: 9087

Hearing Date:	June 19, 2009
Decision Issued:	June 23, 2009
Reconsideration Request Received:	July 6, 2009
Response to Reconsideration:	July 16, 2009

APPLICABLE LAW

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

OPINION

The Grievant seeks reconsideration of the Hearing Officer's Decision based on the following:

1. The Hearing Officer misinterpreted the facts presented at the hearing; and

2. The Hearing Officer should have mitigated the punishment based on the Grievant's prior work history.

Normally as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. In this matter, the Grievant offers no new evidence or allegation of new evidence. The Grievant simply requests that the Hearing Officer reconsider the facts that were presented at the hearing and reach a different conclusion upon his reconsideration. In the Grievant's request for reconsideration, she indicated that she heard the inmate state as follows:

[15] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

They came out and got me today, they said I put a hit out on the yard.

In her testimony at the hearing, the Grievant stated that she assumed that the institution already knew that the inmate had put a "hit out on the yard." The problem now is that the Grievant failed to take the time to be certain that the institution was aware of either a real or potential "hit on the yard." The Grievant continues to discount the fact that the inmate may have lied to her about the institution's knowledge but been telling her the truth about an actual threat. A Correctional Officer with exceedingly little training should know that a threat of this nature, whether real or fake, should be reported. This Grievant purports to be a knowledgeable Correctional Officer and yet she failed to take the most minimal step of notifying her chain of command of the threat, whether real or fake.

This Grievant argues that this matter should have been mitigated to a lesser punishment. The Hearing Officer considered all of the grounds of mitigation that were brought before him at the hearing and, while acknowledging that the Agency certainly had the authority to mitigate if it chose to, the Hearing Officer finds that there is nothing in this Grievant's record that would have compelled the Agency to mitigate this serious offense to a lesser punishment. Accordingly, this Hearing Officer will not impose himself upon the Agency and force a mitigation as he finds nothing extraordinary in this Grievant's work record to justify such a mitigation.

DECISION

The Hearing Officer finds that none of the reasons given for reconsideration by the Grievant rise to a level that would require him to reconsider his Decision. The Hearing Officer has carefully considered the Grievant's arguments and has concluded that there is no basis to change the Decision issued on June 23, 2009.

APPEAL RIGHTS

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or 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. [16]

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

William S. Davidson
Hearing Officer

In the Matter of the
Department of Corrections
October 7, 2009

The grievant has requested that this Department (DHRM) conduct an administrative review of the hearing officer's decision in Case Number 9087. The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review of the hearing officer's decision in the above referenced case. For the reasons stated below, this Department will not interfere with the hearing decision.

FINDINGS OF FACT

The grievant was employed by the Department of Corrections as a Corrections Officer at one of its facilities. At some point in time, she held a discussion with an inmate who mentioned a potential "hit on the yard." She stated that she did not report it to her superiors because she assumed management officials knew about it. She took the word of the inmate that he, the inmate, had told management officials about the so-called "hit." After management officials determined that the grievant had an unauthorized meeting with the inmate and video and audio evidence supported that determination, they charged her with fraternization and failure to report a security threat. They issued to her a Group III Written Notice with termination. The hearing officer overturned the charge of fraternization but upheld the charge of failure to report a condition that posed a security threat. He upheld the Group III Written Notice with termination. He also found that there were no mitigating circumstances to be considered.

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 exceeds the limits of reasonableness, he may reduce the discipline. By statute, this Department 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 each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency,

the hearing decision is inconsistent. In her challenge to DHRM, the grievant submitted the following policies as applicable to her appeal: Department of Corrections Policy 135.1(X11)(B)(7), which sets forth as an example a violation of safety rules where there is a threat of physical harm; and, 135.1(X11)(B)(16) which sets forth that refusal to obey instructions that could result in a weakening of security warrants removal**.** In her appeal to the Department of Employment Dispute Resolution (EDR), the grievant challenged that (1) the hearing officer erred in finding that she had failed to report a security threat (DOC Policy 135.1(X11)(B)(7) and, (2) the hearing officer erred in not mitigating the disciplinary action.

In a ruling by EDR dated September 4, 2009, the Director of EDR addressed the issue of mitigating factors and referred policy interpretation issues to the Department of Human Resource Management. In our opinion, the grievant's challenge does not concern the inconsistent application of policy. Rather, it appears that the grievant is challenging the DOC's and the hearing officer's categorization of the seriousness of the offense. It also appears that she is questioning whether the violation rose to the level of a Group III Written Notice with termination. Finally, it appears that the grievant is contesting the weight the hearing officer afforded the evidence presented and the conclusions he made based on that evidence. There is no evidence to support that the hearing officer violated any of the relevant policies in making his decision. Therefore, this Agency has no basis to interfere with the application of this decision.

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Ernest G. Spratley