Issues: Group III Written Notice (fraternization) and Termination; Hearing Date: 01/07/10; Decision Issued: 01/13/10; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9238; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9238

Hearing Date: January 7, 2010
Decision Issued: January 13, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on August 27, 2009 for:

> Violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees Relationships with Offenders. An ongoing investigation has been conducted from April 21, 2009 through the current time which has revealed drug related activities connected with an inmate and conversations that took place where the inmate gave your personal cell phone number to a third party on the street on two separate occasions and described you in code and knew details regarding you. This conversations/activity stopped while you were out of work on short-term disability. Also, during our meeting on 8/27/09, you revealed information regarding inappropriate conversations you had with inmates regarding other staff where inmates questioned you on relationships you had with female staff as well as information on two staff that were being pressured by inmates to fraternize and did not report this to supervision. [1]

Pursuant to the Group III Written Notice, and a prior active Group III Written Notice and a prior active Group I Written Notice, the Grievant was terminated on August 27, 2009. [2] On September 9, 2009, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On December 8, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On January 7, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Witnesses

[1] Agency Exhibit 1, Tab 1, Pages 1 and 2
[2] Agency Exhibit 1, Tab 6, Pages 1 and 2
[3] Agency Exhibit 1, Tab 1, Page 3

ISSUE

1. Did the Grievant violate VDOC Operating Procedure 130.1 regarding fraternization. [4]

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 eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

[4] Agency Exhibit 1, Tab 4, Pages 1 through 4

The Grievant, at the hearing, asked for the introduction of phone records regarding telephone number 804-***-**** which the Grievant had previously provided to the Agency. Without objection, the above-referenced phone records for the months of March, 2009 through August, 2009 were introduced as Grievant Exhibit 1.

While the charge in the Written Notice is inarticulately drawn, the written charge, coupled with the Agency's testimony, indicates that the Agency feels that the Grievant violated VDOC Operating Procedure 130.1 regarding Fraternization. That policy states that Fraternization is 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. [5]

The Warden for this Agency testified that he had been concerned with this Grievant and had been working a case regarding this Grievant since late 2006. Both the Warden and an Intelligence Officer for the Agency testified that there had been an ongoing investigation regarding drug-related activities within this Agency location. On August 20, 2009, the Grievant was subjected to a drug test and a strip search for drugs. Further, his vehicle was searched for drugs and/or drug contraband. All of those searches were negative and produced no drugs nor any drug paraphernalia. The Grievant testified that he offered for the institution's employees to come to his home and search there as well on that date. That offer was not accepted. [6]

The Intelligence Officer testified she had listened to and recorded several phone calls that were made by inmates of this institution. Pursuant to the search of the Grievant on August 20, 2009, the Grievant related that his cell phone number was 804-***-****. [7] This was the same number that inmates, on the aforementioned recorded calls, had used in conversations with family members. In those phone conversations, there were coded references to "race car driver, UPS, and Kobe Bryant." [8]

The Intelligence Officer and the Warden testified that they concluded that the Grievant was either "race car driver, UPS or Kobe Bryant" or all three (3). Based on this finding, and Grievant's acknowledgment that his phone number was the same number that had been recorded in inmate conversations, the Warden determined the Grievant clearly was guilty of fraternization with inmates.

---

[5] Agency Exhibit 1, Tab 4, Page 1
[6] Agency Exhibit 1, Tab 1, Page 5 and Agency Exhibit 1, Tab 2, Page 2
[7] Agency Exhibit 1, Tab 2, Page 2
[8] Agency Exhibit 1, Tab 2, Page 2

The Grievant was questioned regarding this and he denied attempting to contact either inmates or family members of inmates. The inmate involved in the phone calls denied attempting to contact family members and asking them to contact the Grievant.

On August 20, 2009, the Intelligence Officer who testified before the Hearing Officer in this matter notified a Special Agent of the Office of the Inspector General that the Grievant "was being contacted by inmates at [the facility]." [9] In point of fact, when this memo was written and when memorializing the Intelligence Officer's statement, there was no evidence that the Grievant was being contacted by inmates at [the facility]. There were only recorded phone conversations between an inmate and a third party using code words that the Intelligence Officer and the Warden concluded to be referring to the Grievant. However, based on the above, the Warden determined that the Grievant violated Operating Procedure 130.1 in that he committed Fraternization.

The Grievant testified that he brought no drugs into the institution, had not been found in possession of any drugs, nor had he talked with any inmate or any inmate's family member regarding drugs. The Agency offered no evidence linking the Grievant to any drugs found at the Agency or at any other location.

During the course of his appealing the Warden's findings, the Grievant talked to the Regional Director and was told that, if he produced phone records that showed that he had not been in contact with the offenders who were also part of the monitored phone calls, the Regional Director would see to the removal of this Group III Written Notice. The Grievant provided the Regional Director with phone records from March, 2009 through August, 2009. The entirety of these records produced one (1) phone call coming to the Grievant's phone number from a phone number that the Agency felt was from an inmate or an inmate's family member. That call was received on August 17, 2009 at 8:07 p.m. and lasted for two (2) minutes. [10] The Agency acknowledged that, when the phone record indicates that a phone call is two (2) minutes, that means that it was at least one (1) minute and one (1) second, but no more than two (2) minutes in length. The Grievant testified that he did not receive a phone call from an inmate or an inmate's family member and the Agency offers no evidence to indicate that either the Grievant answered this phone or that the party identified himself or herself who was making the call. It is important to note that the Warden was not in possession of these phone records when he made his determination to terminate the Grievant. The Warden's decision to terminate the Grievant was based without knowledge of this two (2) minute phone call. The Regional Director, apparently based on this one (1) phone call, did not overturn the Written Notice. The Regional Director seems to have assumed that the call was received by the Grievant, that the Grievant knew he was talking to an inmate or family member of an inmate and that the Grievant subsequently failed to properly notify his superiors of this call. Other than the phone record serving as evidence of this one (1) phone call, the Agency offered no evidence to show who received the call, who made the call and did this person identify himself or herself to the receiving party.

The Agency introduced into evidence a letter which is dated November 17, 2009 and which was offered by the Institutional Investigator. Interestingly, this letter provides a very

[9] Agency Exhibit 1, Tab 2, Page D1
[10] Grievant Exhibit 1, Page 8

succinct and accurate summation of the written and oral evidence presented before the Hearing Officer. At paragraph 1, this letter states as follows:

> Upon completion of the investigation conducted by Intelligence Officer A it was determined that [the Grievant] **may** have been involved in drug related activities at [the facility]. It was also determined that [the Grievant] **may** have been involved in possible fraternization with offenders. [11] (Emphasis added)

That letter further points out that a current offender at the institution made several phone calls to his family. At paragraph 2, this letter states as follows:

> [The offender] made, "several calls to his brother and gave telephone number 804-***-****. [The Offender] told his brother to lock the number in his phone and not to lose it. The number was traced back to [the Grievant].[12]

Finally, in paragraph 3, this letter states that the offender made several phone calls to his brother referencing "race car driver." [13]

At no time do any of the recorded phone conversations state that the Grievant is the "race car driver." Based on the Grievant's last name, the institution has simply made an assumption that he must be the "race car driver."

The Grievant testified that the phone number in question is on record with Human Resources within the Agency, is well known by many people at the Agency, and that the phone number was listed in Master Control. The Intelligence Officer who testified stated that she confirmed this phone number belonged to the Grievant by talking to an employee of the Agency. After a review of the phone records introduced by the Grievant at the hearing, the Warden conceded that the Grievant was called at this number from the Master Control number at this institution on several occasions during the period of this investigation. This admission confirms that at least several people at the institution had the Grievant's phone number. More importantly, the Warden testified that inmates do in fact not always tell the truth and he admitted that some Correctional Officers do not always tell the truth.

The Hearing Officer is fully aware that the burden of proof in this matter, which the Agency must bear, is a simple preponderance of the evidence. However, as pointed out by the Institutional Investigator in a document introduced as an Agency Exhibit, the Agency at best has only proven that the Grievant may have been involved in drug related activities and may have been involved in possible fraternization with offenders. The Hearing Officer finds that the

[11] Agency Exhibit 1, Tab 2, Page D8
[12] Agency Exhibit 1, Tab 2, Page D8
[13] Agency Exhibit 1, Tab 2, Page D8

Agency has not reached even this minimal level of proof. It is at least possible that this phone number was being used by a disgruntled inmate in the hopes of harming the Grievant.

Finally, in the Written Notice, it is alleged that on August 27, 2009, the Grievant revealed information regarding inappropriate conversations which he may have had with inmates regarding other staff. The Hearing Officer notes that the offense date for this Written Notice was August 20, 2009. The testimony that was elicited from the Warden regarding these conversations was extremely minimal and, even if sufficient to meet the burden of proof, the Hearing Officer finds that the Grievant was provided no notice regarding these charges, as they were first elicited at the due process hearing for the events that took place on August 20, 2009. It may have been entirely proper for the Agency to write a separate Written Notice for those new charges and it may indeed continue to be proper for the Agency to write a new Written Notice, but they are not part of the Written Notice that was issued to the Grievant for an offense date of August 20, 2009. When evidence is elicited at a due process hearing regarding new issues, then an additional Written Notice is required for such new charges.

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..." [14] 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, because of his finding, the Hearing Officer does not reach the issue of mitigation.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not bourne its burden of proof and that the Group III Written Notice was invalidly issued. The Hearing Officer orders that the Written Notice be removed from the Grievant's record and that the Grievant be reinstated to his former position or, if occupied, to an objectively similar position. Inasmuch as the Grievant specifically asked for no back pay, the Hearing Officer does not order any back pay in this matter.

[14] 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.[15] 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.[16]

[15]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).

[16]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]

_____

William S. Davidson
Hearing Officer