Issue: Group III Written Notice with Termination (Fraternization); Hearing Date: 03/24/10; Decision Issued: 03/29/10; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9284; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9284

Hearing Date: March 24, 2010
Decision Issued: March 29, 2010

PROCEDURAL HISTORY

On December 1, 2009, Grievant was issued a Group III Written Notice of disciplinary action for improper fraternization with an offender.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On March 1, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on March 3, 2010. The hearing was scheduled at the first date available between the parties and the hearing officer, Wednesday, March 24, 2010, on which date the grievance hearing was held, at the Agency's regional facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Representative/Advocate for Grievant
Representative/Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. 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?

The Grievant requests rescission or reduction of the Group III Written Notice and reinstatement to her position, with back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency*. 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect 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).

Code § 2.2-3000 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.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include types of act and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 7. One such example stated in the policy is "violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*." Agency Exh. 7 at p. 9.

The Agency's Operating Procedure No. 130.1 states:

> Fraternization or non-professional relationships between employees and offenders is prohibited, including when the offender is within 180 days of the date following his or her discharge from Department custody or termination from supervision, whichever occurs last. This 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 26, 2006).* Any exception to this section shall be reviewed and approved by the respective Regional Director on a case-by-case basis.

Agency Exh. 5.

The Offense

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

The Agency employed Grievant as a corrections officer for two years, with no other active disciplinary actions indicated.

The facts are largely not in dispute. The Grievant lived with a man who became an offender lodged in another Agency facility. Without permission from the Agency, the Grievant exchanged multiple letters and spoke to the offender by telephone multiple times. The Grievant actually requested permission for visitation with the offender, and, during the Agency's routine investigation into the circumstances, the investigator learned of the Grievant's written and telephonic contact with the offender. During the investigation, the offender provided copies of the letters from the Grievant. Agency Exh. 4. The offender was convicted and incarcerated on drug related offenses, with incriminating evidence found in the home shared with the Grievant. The Grievant did not visit the offender while awaiting permission.

The Grievant received repeated training on the Agency's fraternization policy, and she signed for her receipt and acknowledgment of the applicable policies. The Grievant admitted she was aware of the policy and understood it, but she stated she did not understand that the policy would prohibit such written and telephonic contact when the offender had been a live-in boyfriend. The Grievant admitted understanding the policy to prohibit such a relationship through written and telephonic contacts with offenders—she just felt that it did not apply to her situation with a former live-in boyfriend. The Grievant's misunderstanding of the policy is consistent with her written request limited to visitation approval. The Grievant's apparent frankness and openness regarding her actions also is consistent with her stated belief that her situation was an exception to the policy. However, there is no policy language or other authority to suggest that the intensity of her relationship with the offender provides an exception to the policy prohibiting it. That contention is actually counterintuitive. The more significant the relationship, the greater the potential harm.

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

As referenced above, this offense falls squarely within the Group III category of offenses. The Agency, however, has discretion on severity of the discipline, as the policy states such an infraction *may* be treated as a Group III. Here, the Agency treated it as a Group III and applied the normal discipline for Group III—removal.

Grievant also contends the disciplinary action was excessive, unfair, and unwarranted. The Grievant testified to her belief of other instances of employee non-professional contacts with offenders without disciplinary result. However, Grievant was not able to identify any individual instances of inconsistent application of policy or present evidence as to misapplication or non-consistent application. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Grievant was aware of the policy prohibiting relationships with offenders without permission. The Grievant's excuse of the live-in aspect of her relationship with the offender, while justified in her mind, is not justified by policy.

The Agency witnesses testified to the security basis and rationale for prohibiting such relationships without permission. There is a unique situation for corrections officers and the population of offenders (as opposed to other state employees), and unapproved fraternization is unacceptable and undermines the effectiveness of the Agency's security activities and responsibilities.

While the Grievant presented a sincere belief that the discipline was not justified, the fact remains that her mistake was a serious one. The Agency could have exercised a lesser sanction within its permitted discretion, but its action falls well within its discretionary management function and obligation to promote a secure facility and well-managed workforce. As referenced above, the Hearing Officer is not a "super personnel officer" who can substitute his opinion as to when an agency should use progressive discipline.

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…."

Va. Code § 2.2-3005. Under the Rules for Conducting Grievance Hearings, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

I find that the Grievant had adequate notice of the policy, the Agency consistently applied discipline in this circumstance, and that there was no improper motive in levying the discipline. Further, while otherwise satisfactory work performance is grounds for mitigation by agency management, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Thus, while it cannot be said that otherwise satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's 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 charge, the less significant otherwise satisfactory work performance becomes. Fraternization is clearly a serious charge, normally leading to discharge. Therefore, the Grievant's otherwise positive work record during her two-year tenure should be afforded minimal weight. *See* EDR Ruling #2010-2368 (October 27, 2009). The Grievant fully cooperated with the investigation and was, by all accounts, open and honest about her conduct. However, there is no policy language or other authority to suggest that the intensity of her relationship with the offender provides mitigation to the policy prohibiting it. That contention is actually counterintuitive. The more significant the relationship, the greater the potential harm.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the claimant engaged in the described conduct that the Agency appropriately characterized as misconduct. The Agency's discipline was consistent with law and policy, and no mitigating circumstances exist to reduce the disciplinary action. Accordingly, the Agency's discipline of the Group III Written Notice and removal is upheld.

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, VA 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 the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer