Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 04/08/10; Decision Issued: 04/09/10; Agency: DOC; AHO: Cecil H. Creasey, Jr.; Case No. 9296; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 04/22/10; Reconsideration Decision issued 05/06/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 04/22/10; EDR Ruling #2010-2621 issued 05/21/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/22/10; DHRM Ruling issued 06/16/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9296

Hearing Date: April 8, 2010
Decision Issued: April 9, 2010

PROCEDURAL HISTORY

On December 21, 2009, Grievant was issued a Group III Written Notice of disciplinary action for violation of Department of Corrections (Agency) Operating Procedure 130.1, improper fraternization with an offender, *i.e.*, receiving multiple phone calls from 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 15, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on March 16, 2010. The hearing was scheduled at the first date available between the parties and the hearing officer, Thursday, April 8, 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 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. 5. 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. 5.

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 over four years, with no other active disciplinary actions indicated.

The Grievant was the recipient of a series of telephone calls from her friend, W (a former Agency employee), who had inmate M also on the call from the corrections facility for a three-way call. The Grievant insisted that she did not know that M was an offender, but she insisted she did not converse with them and always demurred from the call. The Grievant testified that she never placed any of these calls. The Grievant admitted she knew M, but that she only interacted with him like she did with any other inmate.

The Agency was investigating inmates and other personnel when inmate M informed the investigator that he had made calls to the Grievant and that she had given him prayer oils, food, and took a cell phone out of the institution for him. When the investigator confronted the Grievant with these allegations in an interview, she denied them. However, according to the Grievant, the investigator insisted she was lying. Because she was scared and stunned by these allegations, she wrote and signed an admission to these allegations under pressure from the investigator. When the warden informed her that he would seek to have her fired, she opted to resign instead. The next day, she rescinded her resignation and recanted her admissions.

The warden, in pursuing the disciplinary process, issued a Group III Written Notice on December 21, 2009, for receiving phone calls from offender M. The Written Notice did not include the other conduct regarding contraband. The Grievant was inconsistent in her response to Agency management, including when she became aware that M, who was on the conference telephone calls her friend W made to her, was actually an offender. The Grievant testified that she essentially refused the calls and told her friend W that she did not want to talk to them. The Grievant testified that she did not carry on any conversation with inmate M and had no non-professional relationship with inmate M.

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. The Grievant received repeated training on the Agency's fraternization policy, and she admitted she was aware of the policy and understood it.

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, the offense of fraternization falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving fraternization. The discipline was based on inmate M's information and the Grievant's admissions. The Grievant has explained away and recanted her admissions as the result of the pressure she felt from the investigator. She recanted the next day. A corroborating factor for the Grievant's recantation is the Agency's lack of discipline for the more serious fraternization allegations involving contraband. The Agency only charged the Grievant with an inappropriate non-professional relationship with an inmate based on the three-way telephone calls that the friend W made to the Grievant. While admitting the calls were made to her, the Grievant denies any telephone conversation with inmate M.

The Grievant testified that she had no conversations with inmate M despite him being on the three-way phone call when the Grievant's friend W called her. No evidence was presented at the hearing regarding any content of the conversations. I find that the Grievant testified credibly about the limited and involuntary nature of the telephone contact with inmate M. The Grievant asserted that she had a falling out with her friend and former co-worker W and that W was trying to set her up.

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant to be credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of the witnesses; they cannot be cross-examined, nor their

recollections probed. While the Agency may point to certain corroborating information to support its conclusions, the weight of such evidence does not overcome the Grievant's testimony. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other.

The Hearing Officer can find no language in Operating Procedure 130.1 that requires reporting of contacts, meetings, or phone calls with offenders. The testimony of the Agency witnesses seemed to indicate that the major concern with the Grievant was that she did not report the phone calls. However, the Written Notice did not address reporting. Regardless, I can find no rule in the policy that calls for her to report these contacts. Since reporting is not the issue, then the question is whether the offender's phone calls fall under the definition of fraternization and were inherently prohibited. There is insufficient evidence to find that the phone calls reached a level of fraternization such that they rose to unacceptable, unprofessional, or prohibited behavior. Without more, the Agency has not borne its burden of proving an inappropriate non-professional relationship as charged. The Agency has presented insufficient evidence to support the issuance of the Group III Written Notice.

The evidence preponderates in showing that the Grievant received up to five of these phone calls from her friend W who had inmate M also conferenced on a three-way call. The Agency has the burden to prove it is more likely than not that Grievant created the appearance of fraternization. The Agency has not done so in this case. I do not find this to constitute a relationship or the appearance of an inappropriate relationship. Accordingly, the disciplinary action must be reversed.

It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions his agency presented to him and the Grievant's inconsistent responses. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony to be at least as credible as the contrary information and conclusions charged by the internal investigation. All that is shown by the evidence is that inmate M attempted, through a surrogate, to reach the Grievant by telephone. The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy. A policy requiring Agency employees affirmatively to report such attempts by offenders, if the Agency has such a policy, may be reasonable. However, as charged, the Written Notice does not comport with evidence presented at the hearing. For this reason, I find that the Agency's case does not meet its burden of establishing the charged misconduct.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action removal is **reversed and rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim

earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONDIDERATION DECISION OF HEARING OFFICER

In the matter of: Case No. 9296

Hearing Date:	April 8, 2010
Decision Issued:	April 9, 2010
Reconsideration Decision Issued:	May 6, 2010

RECONSIDERATION DECISION

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, (effective August 30, 2004) provides, "A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, 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. Requests may be initiated by electronic means such as a facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director."

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 conclusion is the basis for such a request. § 7.2(a)(1), Grievance Procedure Manual.

On April 23, 2010, the Agency's request for reconsideration was received timely. No response was received from the grievant. The Agency has raised four numbered points of error, some arguing errors of fact and others arguing errors of policy.

1. The Agency argues that the hearing officer erroneously found credible the grievant's recantation of her admission. The Agency argues that the grievant did not recant her admission of giving food to the involved inmate. Regardless of the accuracy of the Agency's contention that the grievant did not recant her admission of giving food to the inmate, the Written Notice was specifically limited to the grievant's involvement by answering her private telephone when the offender was on a three-way call. According to the Written Notice, the grievant was not disciplined for giving food to the inmate. While other acts might be considered

aggravating circumstances, they cannot be substituted for the conduct charged in the Written Notice.

2. The Agency takes issue with the hearing officer's failure to uphold discipline based on the grievant's failure to report the inmate's inappropriate actions in telephoning her. The Agency states that the grievant's failure to report is subsumed in the Written Notice. However, the hearing officer finds nothing in the Written Notice placing the grievant on notice that the discipline is based on a failure of reporting. The Agency articulates a reasoned basis to find that the grievant should have reported the inmate's attempt to contact her for non-professional reasons, however that was not the charge in the Written Notice. Again, while other acts might be considered aggravating circumstances, they cannot be substituted for the conduct charged in the Written Notice.

3. The Agency argues that the hearing officer should have held the grievant to a higher standard of judgment. However, as the Agency states in its request for reconsideration, "[w]e do not know what the nature of the call was or what was being discussed with this Grievant; we do not know what plans might have been discussed; nor do we know what this offender might have been plotting, especially given the fact that we have since discovered he was already interacting improperly with other female employees." The hearing officer conducts a *de novo* hearing, and the decisions must be made based on the conduct described in the Written Notice and the evidence presented at the hearing. The hearing officer cannot consider speculation or evidence not introduced at the grievance hearing.

The Agency argues that the grievant did not sufficiently prove the nature of the telephone contacts and what was spoken. The burden of proof rests with the Agency

4. The Agency asserts that the hearing officer inappropriately placed emphasis on the investigative report rather than the evidence of the Grievant's direct admission to the warden. The hearing officer considered all the evidence presented. The hearing officer found the grievant's account presented at the grievance hearing credible and found that the Agency had not borne its burden of proof that the conduct described in the Written Notice rose to misconduct as charged. The hearing officer did not absolve the grievant of any alleged misconduct not included in the Written Notice.

The Agency argues, in sum, that the Grievant should have reported the contacts or attempted contacts made by the offender toward the Grievant. The Agency contends this failure of the Grievant to report, as stressed throughout the Grievant's training, mandates and justifies the discipline and termination issued in this case. However, as stated in the original grievance decision and above, the Written Notice did not charge the grievant with failure to report or any of the other infractions referenced or alluded to.

Finally, the Agency presents a position in advance of its role as guardian of public and institutional safety and arguing that the hearing officer's decision contravenes that paramount mission. The hearing officer accepts, recognizes and upholds the Agency's important role in public safety and the valid public policies promoted by the Agency. However, the hearing

officer conducts a *de novo* hearing, and the hearing officer must weigh the evidence presented and make an independent finding and decision, based on the Written Notice.

The Agency has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for its request for reconsideration. The issues raised by the Agency were considered and decided in the original decision, and the hearing officer, after conducting a *de novo* hearing, found the Agency did not meet its burden of proving the offense by a preponderance of the evidence. For this reason and the rationale expressed in the underlying decision, the hearing officer hereby denies the Agency's request for reconsideration and hereby affirms his decision that the Agency has failed to meet its burden of proving by a preponderance of the evidence that the discipline was warranted and appropriate.

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. 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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections

June 16, 2010

The agency has requested an administrative review of the hearing officer's decision in Case No. 9239. The agency is challenging the hearing officer's decision on the basis that it is a misapplication and misinterpretation of the Department of Corrections (DOC) policy. For the reason stated below, we will not disturb the hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Corrections employed the grievant as a Corrections officer until she was issued a Group III Written Notice and terminated for the following:

"On 12/18/09, by your own admission, you admitted to receiving phone calls from Offender M1 even after you knew the offender was here at Nottoway. Then on 12/20/09, you confirmed your participation in 3-way calling with an offender by voice mail left on my work extension. This was confirmed by your rebuttal this morning. Therefore, you are being cited for a Group III and termination because this is clearly a violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees."

Based on the application of that policy, the agency terminated the grievant. In his **Findings of Facts,** the hearing officer states, in part, the following:

> 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 over four years, with no other active disciplinary actions indicated.
>
> The Grievant was the recipient of a series of telephone calls from her friend, W (a former Agency employee), who had inmate M also on the call from the corrections

1 The name of the inmate was removed to preserve confidentiality.

facility for a three-way call. The Grievant insisted that she did not know that M was an offender, but she insisted she did not converse with them and always demurred from the call. The Grievant testified that she never placed any of these calls. The Grievant admitted she knew M, but that she only interacted with him like she did with any other inmate.

The Agency was investigating inmates and other personnel when inmate M informed the investigator that he had made calls to the Grievant and that she had given him prayer oils, food, and took a cell phone out of the institution for him. When the investigator confronted the Grievant with these allegations in an interview, she denied them. However, according to the Grievant, the investigator insisted she was lying. Because she was scared and stunned by these allegations, she wrote and signed an admission to these allegations under pressure from the investigator. When the warden informed her that he would seek to have her fired, she opted to resign instead. The next day, she rescinded her resignation and recanted her admissions.

The warden, in pursuing the disciplinary process, issued a Group III Written Notice on December 21, 2009, for receiving phone calls from offender M. The Written Notice did not include the other conduct regarding contraband. The Grievant was inconsistent in her response to Agency management, including when she became aware that M, who was on the conference telephone calls her friend W made to her, was actually an offender. The Grievant testified that she essentially refused the calls and told her friend W that she did not want to talk to them. The Grievant testified that she did not carry on any conversation with inmate M and had no non-professional relationship with inmate M.

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. The Grievant received repeated training on the Agency's fraternization policy, and she admitted she was aware of the policy and understood it.

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, the offense of fraternization falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving fraternization. The discipline was based on inmate M's information and the Grievant's admissions. The Grievant has explained away and recanted her admissions as the result of the pressure she felt from the investigator. She recanted the next day. A corroborating factor for the Grievant's recantation is the Agency's lack of discipline for the more serious fraternization allegations involving contraband. The Agency only charged the Grievant with an inappropriate non-professional relationship with an inmate based on the three-way telephone calls that the friend W made to the Grievant. While admitting the calls were made to her, the Grievant denies any telephone conversation with inmate M.

The Grievant testified that she had no conversations with inmate M despite him being on the three-way phone call when the Grievant's friend W called her. No evidence was presented at the hearing regarding any content of the conversations. I find that the Grievant testified credibly about the limited and involuntary nature of the telephone contact with inmate M. The Grievant asserted that she had a falling out with her friend and former co-worker W and that W was trying to set her up.

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant to be credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of the witnesses; they cannot be cross-examined, nor their recollections probed. While the Agency may point to certain corroborating information to support its conclusions, the weight of such evidence does not overcome the Grievant's testimony. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other.

The Hearing Officer can find no language in Operating Procedure 130.1 that requires reporting of contacts, meetings, or phone calls with offenders. The testimony of the Agency witnesses seemed to indicate that the major concern with the Grievant was that she did not report the phone calls. However, the Written Notice did not address reporting. Regardless, I can find no rule in the policy that calls for her to report these contacts. Since reporting is not the issue, then the question is whether the offender's phone calls fall under the definition of fraternization and were inherently prohibited. There is insufficient evidence to

find that the phone calls reached a level of fraternization such that they rose to unacceptable, unprofessional, or prohibited behavior. Without more, the Agency has not borne its burden of proving an inappropriate non-professional relationship as charged. The Agency has presented insufficient evidence to support the issuance of the Group III Written Notice.

The evidence preponderates in showing that the Grievant received up to five of these phone calls from her friend W who had inmate M also conferenced on a three-way call. The Agency has the burden to prove it is more likely than not that Grievant created the appearance of fraternization. The Agency has not done so in this case. I do not find this to constitute a relationship or the appearance of an inappropriate relationship. Accordingly, the disciplinary action must be reversed.

It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions his agency presented to him and the Grievant's inconsistent responses. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony to be at least as credible as the contrary information and conclusions charged by the internal investigation. All that is shown by the evidence is that inmate M attempted, through a surrogate, to reach the Grievant by telephone. The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy. A policy requiring Agency employees affirmatively to report such attempts by offenders, if the Agency has such a policy, may be reasonable. However, as charged, the Written Notice does not comport with evidence presented at the hearing. For this reason, I find that the Agency's case does not meet its burden of establishing the charged misconduct.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action removal is **reversed and rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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 beyond reasonableness, 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.

On December 21, 2009, the grievant was issued a Group III Written Notice of disciplinary action with removal for violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees. She challenged the disciplinary action by filing a grievance. When she did not get the relief she sought, she requested and received a hearing before an administrative hearing officer. In his decision, the hearing officer rescinded the disciplinary actions and granted full reinstatement of the grievant to her position.

The agency requested a reconsideration decision from the hearing officer and administrative reviews from the Department of Employment Dispute Resolution and the Department of Human Resource Management. In a ruling dated May 21, 2010, the Director of the Department of Employment Dispute Resolution upheld the decision of the hearing officer. In her ruling, she stated that it is the sole responsibility of DHRM to address the policy issues raised by the DOC, namely, that the hearing officer misapplied and misinterpreted DOC policy.

The relevant policy regarding disciplinary action, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the provisions of DOC Rules for Governing Employees apply in this instance.

The DOC dismissed the employee for the following reason:

> On 12/18/09, by your own admission, you admitted to receiving phone calls from Offender M even after you knew the offender was here at Nottoway. Then on 12/20/09, you confirmed your participation in 3-way calling with an offender by voice mail left on my work extension. This was confirmed by your rebuttal this morning. Therefore, you are being cited for a Group III and termination because this is clearly a violation of DOC Operating Procedure 130.1, Rules of Conduct Governing Employees.

The agency contends the following:

> The Hearing Officer based his decision on (1) the institution not having a policy requiring an employee to generate a report or reporting a phone contact with an offender; (2) that even though she admitted to her inappropriate behavior, she recanted that admission, saying she was pressured by the investigator when she was being interviewed about this situation; (3) that the agency did not charge her with "the more serious offenses of bringing contraband, but instead the less serious charge of an inappropriate non-professional relationship with an inmate on the 3-way telephone calls"; and (4) he found the Grievant to be credible.

Concerning Item (1) above, a ruling by the Director of the Department of Employment Dispute Resolution regarding this issue dated May 21, 2010, states, in part:

> "Section VI (B) of the *Rules* provides that in every instance, an "employee must receive notice of the charges in sufficient to allow the employee to provide an informed response to the charge." Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by the hearing officer. In addition, the *Rules* provides that "Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have qualified. Thus, such unstated charges are not before a hearing officer."
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> "Thus, the only misconduct cited on the grievant's Written Notice to support the conclusion that she had violated DOC Operating Procedure 130.1 were the alleged inappropriate communications with Inmate M-there in no mention of the grievant's failure to report the inappropriate calls from Inmate M. Accordingly, this Department finds no error on the part of the hearing officer for not considering the agency's argument that the grievant violated policy by failing to report the calls with Inmate M."

Concerning Item 2 and Item 4, these issues are evidentiary in nature and will not be discussed in this ruling. These conclusions made by the hearing officer were based on the hearing officer's assessment of the data and his assessment of the credibility of the grievant.

Concerning Item 3, this fact does not raise a policy interpretation or policy misapplication on which this Department can rule.

Conclusion

It is the opinion of this Department that the issues identified in the aforementioned request for administrative review do not represent issues related to policy interpretation. Rather, they represent evidentiary issues that, base on its administrative review, the EDR has addressed. Therefore, this Department has no authority to intervene in this matter.

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Ernest G. Spratley