Issue: Group III Written Notice with Termination (Falsification of a State Document); Hearing Date: 04/28/11; Decision Issued: 04/29/11; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9564; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9564

Hearing Date: April 28, 2011
Decision Issued: April 29, 2011

PROCEDURAL HISTORY

Grievant is a corrections officer for the Department of Corrections ("the Agency"), with 4 years of service. On January 21, 2011, the Grievant was charged with a Group III Written Notice for fraternization with a probationer on and prior to September 10, 2010. The discipline included termination. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On April 4, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on April 8, 2011. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, April 28, 2011, on which date the grievance hearing was held, at the Agency's facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant offered no additional exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative and Witness for Agency
Advocate for Agency

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, reinstatement and 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. Exception*- Any family or pre-existing non-professional relationship (established friendship, prior working relationship, neighbor, etc.) between employees and offenders, including when the offender is within 180 days of the date following his or her discharge from Departmental custody or termination from supervision, whichever occurs last, must be reported to the Warden, Superintendent or Chief Probation and Parole Officer. In consultation with the Regional Director, a decision will be made regarding future contact between the employee and the offender. The Regional Director has final authority in these matters.

Agency Exh. 3.

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, with 4 years of service. The Grievant has no other active disciplinary actions. On September 10, 2010, the Grievant admitted that she accepted as a "friend" on the internet social network Facebook a probationer who was formerly incarcerated as an offender in the Grievant's facility. The Grievant was actually one of a number of Agency employees who were discovered, through an internal investigation, to have made similar associations with the probationer.

The Agency witness, the facility warden, testified to the security basis and policy rationale for prohibiting such relationships without permission. The Agency provided regular training on the meaning and prohibition of fraternization. The warden testified that the Grievant admitted to him that she knew the probationer from her professional contact with him while he was an inmate. The warden testified that the other employees who were found to have "friended" the probationer were similarly disciplined. The Grievant was confronted with this information within two days of her acceptance of the probationer on Facebook. The Grievant, while present and having cross-examined the warden, elected not to testify at the grievance hearing. The Grievant argued that she had no actual conversation or interraction with the probationer through Facebook, but she conceded that she gave the probationer access to whatever personal information she had available on her Facebook site, such as hometown, telephone number, etc.

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 the Grievant's acceptance of a probationer's request to become a "friend" on the internet social network Facebook. 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.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Based on the evidence of the Grievant accepting the probationer's friend request, the Agency has satisfied its burden of proving existence of a prohibited relationship. The offense, unless circumstances warrant mitigation, satisfies the Group III level of discipline as a violation of applicable policy presenting a potential, if not actual, security threat.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent

some statutory, policy or other infraction by management. *Id*.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." The warden testified that, because of the security aspect of the offense, the Agency considered the offense to be a Group III and that no mitigation could be justified. While the Grievant elected not to testify, the facts show that the internet relationship did not seemingly last long or progress.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that the discipline levied was its only option. Here, one could reasonably conclude that the Agency could easily have justified a lesser discipline and given the Grievant a second chance. However, even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

While she did not testify, the Grievant submits, reasonably, that the Agency could have exercised discipline along the continuum short of a Group III Written Notice with termination. The Agency had the discretion to elect less severe discipline, as the applicable policy did not require dismissal. 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 Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." 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.

Grievant contends the disciplinary action should be mitigated. Grievant contends her otherwise good work history, service and performance should provide enough consideration to mandate a lesser sanction than a Group III. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However,

> a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors 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 length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

The Agency presents a position in advance of its role as guardian of public and institutional safety and asserts that the Grievant's conduct of accepting or establishing an association with a probationer is a breach of policy and security that warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in public safety and the valid public policies promoted by the Agency and its policies. I find that the Grievant's conduct of affirmatively associating with a probationer through the internet social network Facebook amounts to prohibited fraternization. The potential mitigating factor that the Agency discovered the prohibited association within a couple of days does not inure to the Grievant's benefit or reduce the offense. Accordingly, under the confines of the hearing officer's authority, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice and termination must be and 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 shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer