

Issue: Group II Written Notice with Transfer (failure to follow policy); Hearing Date: 05/20/11; Decision Issued: 05/25/11; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9567; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 9567

Hearing Dates: May 20, 2011  
Decision Issued: May 25, 2011

**PROCEDURAL HISTORY**

The Grievant was issued a Group II Written Notice on October 22, 2010 for:

On 10/7/10, you reported to me in a telephone call that you had been involved in a romantic relationship with a Corrections Officer at [facility], and that the relationship had been going on for approximately four years. This is in violation of DOC policy, specifically HR Memorandum 2006-01, Consensual Personal Relationships in the Workplace, and DOC Operating Procedure 101.3. This offense constitutes a Group II violation of the Standards of Conduct.<sup>1</sup>

Pursuant to the Group II Written Notice, the Grievant received a disciplinary transfer with no reduction in pay.<sup>2</sup> On November 29, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.<sup>3</sup> On April 15, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On May 20, 2011, a hearing was held at the Agency's location.

**APPEARANCES**

Advocate for the Agency  
Advocate for Grievant  
Grievant  
Witnesses

**ISSUE**

1. Did the Grievant violate DOC Policy as set forth in Human Resource Memorandum 2006-01 and Operating Procedure 101.3 by being involved in a romantic relationship with a Corrections Officer?

**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

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>3</sup> Agency Exhibit 1, Tab 1, Page 3

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **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 five (5) tabbed sections and that notebook was accepted without objection as Agency Exhibit 1. During the course of the hearing, without objection, pages 8 and 9 were added to Tab 4 of Agency Exhibit 1.

The Grievant did not provide the Hearing Officer with any documentary evidence.

The essential facts in this matter are uncontradicted. On the morning of October 7, 2010, when the Warden came to work, he had a phone message from the Grievant. When he returned that phone call, the Warden was informed by the Grievant that he had had a personal relationship with a Corrections Officer at [facility]. This relationship had lasted for several years. During the prior evening, this Corrections Officer had come to the Grievant's home and a verbal disagreement had ensued. The Grievant stated that this fellow Corrections Officer made threats

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

of bodily harm to him and the County Sheriff's Department was called. No formal charges were made.<sup>7</sup>

Pursuant to this phone call, the Written Notice was issued to the Grievant alleging that he was in Violation of HR Memorandum 2006-01 and DOC Operating Procedure 101.3. The Department of Corrections Operating Procedure 101.3 sets forth Standards of Ethics and Conflicts of Interest.<sup>8</sup> This policy, at 101.3(II), states in part as follows:

This operating procedure applies to all employees...providing services to offenders of the Department.<sup>9</sup>

This policy, at 101.3(III), defines Supervisor as follows:

An employee in a higher position or rank; generally overseeing or directing the work of others, or in a direct administrative relationship to someone in a lower level position.<sup>10</sup>

This policy, at 101.3(III), defines Subordinate as follows:

An employee in a lower position or rank, generally subject to or under the authority of a person in a higher position or with higher rank.<sup>11</sup>

Under the heading of Consensual Personal Relationships/Sexual Harassment in the Workplace, this policy, at 101.3(IV)(E), provides as follows:

Dating or intimate romantic relationships between supervisors and subordinates undermines the respect for supervisors with the other staff, undermines the supervisor's ability to make objective decisions, **may** result in favoritism or perceived favoritism, **may** lower morale among co-workers or open supervisors to future charges of harassment or retaliation claims. Additionally supervisory/subordinate relationships **may** bring about complaints from co-workers and create a liability for the Department.<sup>12</sup> (Emphasis added)

Policy 101.3(IV)(E)(a), (b) and (c) provides as follows:

a. A subordinate includes anyone in a supervisor's direct chain of command. In those instances where the unit head determines that the routine work environment is adversely affected by the romantic, intimate or sexual relationship of a supervisor and subordinate **who is in an indirect line of supervision** (i.e. corrections officer and sergeant on different shifts and breaks),

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<sup>7</sup> Agency Exhibit 1, Tab 1, Page 5

<sup>8</sup> Agency Exhibit 1, Tab 4, Page 1

<sup>9</sup> Agency Exhibit 1, Tab 4, Page 1

<sup>10</sup> Agency Exhibit 1, Tab 4, Page 2

<sup>11</sup> Agency Exhibit 1, Tab 4, Page 2

<sup>12</sup> Agency Exhibit 1, Tab 4, Pages 3 and 4

such relationships may be deemed inappropriate for the workplace and may be grounds for discipline under the DOC Standards of Conduct.

b. Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. Initiation of or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending on its effect on the work environment.

c. **All employees are responsible** for compliance with the above policy regarding consensual personal relationships in the workplace. The Organizational Unit Head will determine the appropriate disciplinary action to be taken and the reassignment or transfer of the supervisor or employee to alleviate the supervisor/subordinate work problems the relationship may create. (Emphasis added)<sup>13</sup>

The Department of Corrections Human Resources Memorandum HR-2006-1 dealt with Consensual Personal Relationships in the Workplace.<sup>14</sup> This memorandum, at Procedure 5-4.9.1, provides as follows:

Consensual Personal Relationships in the Workplace: The Department should provide a workplace that reflects its values and that is equitable, fair and free from pressure and sexually harassing conduct and intimidation. Dating or intimate romantic relationships between supervisors and subordinates undermine the respect for supervisors with the other staff, undermine the supervisor's ability to make objective decisions, **may** result in charges of favoritism or perceived favoritism, **may** lower morale among co-workers, or open supervisors to future charges of harassment or retaliation claims. Additionally, supervisory/subordinate relationships **may** bring about complaints from co-workers and create a liability for the Department. The Department will not condone acts of sexual harassment or inappropriate behavior by any staff. Appropriate action will be taken against persons who engage in sexual harassment.

Therefore, the Department is adopting a policy prohibiting supervisors from dating their subordinates.

A. A subordinate includes anyone in a supervisor's direct chain of command.

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<sup>13</sup> Agency Exhibit 1, Tab 4, Page 4

<sup>14</sup> Agency Exhibit, Tab 4, Page 8

- B. A supervisor shall not initiate, participate in, or maintain an intimate romantic or dating relationship with a subordinate. Such behavior is a violation of the Standards of Conduct and will be treated as a Group I, Group II, or Group III offense depending on its effect on the work environment.
- C. All employees are responsible for compliance with the above policy regarding consensual personal relationships in the workplace. The organizational unit head will determine the appropriate disciplinary action to be taken and the reassignment or transfer of the supervisor or employee to alleviate the supervisor/subordinate work problems the relationship may create. <sup>15</sup> (Emphasis added)

The Hearing Officer heard much evidence as to whether or not the Corrections Officer involved in this relationship with the Grievant was within his supervisory chain of command. The Grievant was a Sergeant and was the Institutional Investigator. The Hearing Officer heard that normally this institution had four (4) supervisors: Two (2) higher ranking officers; a Sergeant; and the Grievant, who was also a Sergeant. In the normal course of business, no one other than the Intelligence Officer, reported to the Grievant. However, in his testimony, the Grievant acknowledged that he was a supervisor and that there could be situations where he would have to step in and fill the role of the Sergeant that was in the normal hierarchical chain of command and to whom all Corrections Officers reported. When questioned by his own advocate, the Grievant acknowledged that DOC Operating Procedure 101.3 applied to him.

The Grievant's Employee Work Profile ("EWP"), under Core Responsibilities, states that forty percent (40%) of his core responsibility will be to conduct investigations on all assignments received from the Warden and/or a Major as well as perform as shift supervisor as necessary. <sup>16</sup>

All witnesses, both Agency and Grievant, agreed that there had been no indication at all that this relationship damaged either the Grievant's ability to perform or the Corrections Officer's ability to perform in the years that it went on prior to the Grievant informing the Warden. There also was no disagreement that this relationship did not impact either of the performances of these two (2) individuals after revelation of this relationship and prior to the Grievant's transfer.

However, both 101.3(IV)(E) and HR-2006-1 use the word "may" when setting forth the potential issues that could arise in matters of this type. Further, 101.3(IV)(E)(a) allows the Unit Head to determine if the work environment is affected. In this case, once this matter became public, the Warden had the authority to determine that it may affect the work environment.

The Hearing Officer finds that the Agency has borne its burden of proof in this matter and finds that, while the Grievant and this Corrections Officer may not have been in a day-to-day supervisor/subordinate relationship, that relationship was entirely possible within the definition of the Grievant's EWP. Even if that relationship were to never arise, it is clear from Operating

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<sup>15</sup> Agency Exhibit 1, Tab 4, Page 8

<sup>16</sup> Agency Exhibit 1, Tab 3, Page 2

Procedure Policy 101.3(IV)(E)(a) that the Unit Head may deem the relationship improper even if there is an indirect relationship.

While there was no oral testimony on this fact, in his Grievance Form A attachment, the Grievant raises an issue of disparate treatment in this matter in that others have done the same thing and have not received punishment.<sup>17</sup> In his response, the Warden included a page from a Second Resolution Step in what appears to be a prior grievance for an unrelated third party. This document is dated August 7, 2001. It makes a full and complete reference to this Grievant's allegation of disparate treatment and the Hearing Officer finds that the Grievant has not shown that there was disparate treatment.

### **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..."<sup>18</sup> 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 finds that the Agency properly considered mitigation in this matter as set forth in the Written Notice of October 22, 2010.<sup>19</sup>

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter and upholds the Group II Written Notice and the transfer.

### **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:

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<sup>17</sup> Agency Exhibit 1, Tab 1, Page 6

<sup>18</sup> Va. Code § 2.2-3005

<sup>19</sup> Agency Exhibit 1, Tab 1, Page 1

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 14<sup>th</sup> Street, 12<sup>th</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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

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William S. Davidson  
Hearing Officer

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<sup>20</sup>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).

<sup>21</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.