

Issue: Group III Written Notice with Termination (fraternization and failure to follow policy); Hearing Date: 09/15/11; Decision Issued: 09/26/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9654; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 10/11/11; EDR Ruling No. 2012-3137 issued 12/12/11; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 10/11/11; DHRM Ruling issued 01/09/12; Outcome: AHO's decision affirmed.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9654**

Hearing Date: September 15, 2011  
Decision Issued: September 26, 2011

**PROCEDURAL HISTORY**

On February 2, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On February 26, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case do to the unavailability of a party. On September 15, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
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?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities until her removal effective February 2, 2009. The purpose of her position was to, "provide security and supervision of adult offenders at this facility."<sup>1</sup> Grievant received training regarding the Agency's prohibition against fraternization with offenders. She had been employed by the Agency for approximately 12 years prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing. In September 2008, Grievant received an overall rating of Exceeds Contributor on her annual performance evaluation.

The Facility is a Level II security prison. Inmates residing at the Facility live in dormitories, not cells. Inmates are permitted to have storage lockers in which to keep personal items. Inmates are permitted to subscribe to newspapers and receive and read those newspapers at the Facility. The Facility is located in a rural part of the Commonwealth. The Newspaper is published at least two times per week in the Locality. Employees at the Facility frequently are referenced in stories written in the Newspaper.

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<sup>1</sup> Agency Exhibit 4.

The Inmate began his incarceration at the Facility in 2000. As compared to other inmates at the Facility, the Inmate was highly focused on the personal lives and families of employees working at the Facility. The Inmate subscribed to the Newspaper and routinely read the Newspaper in depth. If an article in the Newspaper referred to an employee at the Facility, the Inmate would often cut out the article and save it. He would approach employees at the Facility and ask them questions about whether they had read an article in the Newspaper about a particular employee.

Grievant was responsible for supervising inmates. To carry out those duties, she had daily contact with the Inmate and other offenders at the Facility. The Inmate was infatuated with Grievant.

Grievant's birthday is December 16.

On December 3, 2007, the Sergeant<sup>2</sup> obtained a copy of a letter that the Inmate had written to the Newspaper seeking to place a personal ad. The ad was entitled "Girl of My Dreams." The Sergeant had obtained permission from the Assistant Warden to review the mail of the Inmate for illegal or unauthorized correspondence between the Inmate and correctional staff at the Facility.

On December 16, 2007, the Newspaper published an ad stating:

Girl of my dreams,

I say your name means, "blind". You say it means "radiant". You're right of course. But then, you usually are. You lift my spirit with joy and bring a smile to my face. As you celebrate your special day on December 16, remember: you're all that ... and a bag of chips. You're a cynosure.

You know who.<sup>3</sup>

On December 26, 2007, the Inmate drafted a letter to his cousin seeking information about Grievant. The Inmate wrote:

The information I want you to look up is about [Grievant]. She was born [Grievant's former name] on [location] in Virginia, possibly [Location] County. And she currently lives in [Location] County. She has a daughter in [Location] Central High School in 11<sup>th</sup> grade named [Name]. Remember, [Grievant's first name] codename is Rachel. Always use the name "Rachel" ....<sup>4</sup>

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<sup>2</sup> The Sergeant served as the Facility's Investigator.

<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> Agency Exhibit 2.

In January 2008, the Inmate approached Grievant and showed her the personal ad and told her it was directed at her. Grievant was offended by the Inmate's behavior and told him not to do anything like that again. The Inmate asked if she was going to report him. Grievant did not say anything and walked away. Grievant did not report the incident to a supervisor.

The Inmate was removed from the dormitories and placed in a segregation cell.

The Sergeant searched the Inmate's personal property and lockers and recovered numerous newspaper articles that were connected to employees at the Facility and the family members of those employees. For example, a picture in the Newspaper showed approximately 13 employees of the Facility who had "adopted" three local families for the Christmas holiday. The picture caption mentioned that the employees provided food items to help the families. The Inmate collected an article about a home the Warden had restored. One article showed the names of people involved in real estate transfers in the locality for November 2007. Another article showed the names and birthdays and anniversaries of individuals living in the Community.

On March 10, 2008, Grievant was interviewed by Special Agent T and the Sergeant regarding the allegations against her. She stated:

I have never engaged in any type of sexual or romantic relationship with [the Inmate]. I have never written him any letters or received any letters from him. I have never received any telephone calls from him. I have never given him any personal information to him about my age, home address, or birthdate. I have never had any sexual or romantic conversations with him. It is common knowledge that I live in the community because there are several inmates that have been here at [the Facility] that are distant relatives of mine and my children are always in the local paper. I have been approached by [Inmate] with the local newspapers and he has shown the articles containing my children etc. I never discussed anything about the meaning of my name. However, he did tell me that he had written an article and had it published in the newspaper for my birthday. I saw the paper and read it and told him not to do it again. I have also heard from other inmates that I allegedly gave [Inmate] some money but that is not true. I am not engaged in any type of relationship with him or any other inmate. I do not know why inmates would say these things. I did not tell any staff member (supervisors) about the article or my conversations with [Inmate] about the article.

On March 10, 2008, Special Agent T and the Sergeant interviewed the Inmate. The Inmate wrote a statement as follows:

The articles in my property are retrieved from the local newspaper and were not used for any illegal purpose. Those articles were used for

conversation with staff and for scrap booking. I have never used any of this information to offend or threaten any officers at [Facility] while at work or at home. I have no intention of using any of the information from the articles to contact any of the officers or for any personal gains. In regards to the allegations that I am engaged in any type of relationship (romantic, or sexual) with [Grievant], I had engaged in general conversation with [Grievant] about the Bible, and general things, but never about anything personal. I have nothing more to say about the information that has been presented to me by [Special Agent T and the Sergeant] concerning the article that I placed in the local newspaper. I admit writing to my cousin asking him to obtain personal information about [Grievant] for me because I wanted to stay in touch with her when I was released. I have nothing further to say about that article.<sup>5</sup>

On March 16, 2008, the Inmate drafted two letters intended for Grievant and gave them to Corrections Officer F. The Inmate asked that the letters be given to Grievant. In the letters, the Inmate attempted to inform Grievant of his interview with Special Agent T and the Sergeant and instruct Grievant how to answer questions from Special Agent T and the Sergeant about their relationship. Corrections Officer F gave the letters to a supervisor and did not deliver them to Grievant.

The Inmate was transferred to another Facility on April 11, 2008. The Inmate read that Grievant's father died in May 2008 and then placed an ad in a newspaper offering his condolences to Grievant. When Grievant learned of the Inmate's actions in June 2008, she was upset and became more fearful of the Inmate.

On October 31, 2008, Grievant met with Special Agent T for a second interview and statement. Grievant wrote:

[Special Agent T] questioned me regarding statements that [the Inmate] made indicating that I provided him with personal information such as my birthday and other personal information about my family. This is not true. I had never discussed my personal information with [Inmate] or anything about my family. It is common knowledge that I have a daughter who works at [Another Facility] and her name is [Name]. Her last name is not [Grievant's last name] however, it was [J] then [T], and now it is [J]. Many inmates have been to [the Facility] from [the Other Facility] that have come to me and other officers and have stated that they knew that I had a daughter that worked at [the Other Facility] but I've never told them that was true or denied it. My daughter's name as well as the rest of my family's name is always in the local newspaper. My family is well known in the local county. I have never discussed with [Inmate] anything about liking him or wanting to be in a relationship with him. I have never told [the Inmate] that [Sergeant M] and I were involved in a romantic or physical

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<sup>5</sup> Agency Exhibit 2.

relationship however it is common knowledge at [the Facility] that [Sergeant M] and I have been involved in a relationship and are currently involved in a relationship. [Sergeant M] has never discussed our relationship with [Inmate] to my knowledge. In May when my father passed away, I saw an article [in] June in the [Newspaper B] that [Inmate] had written expressing his condolences for the loss of my father. This upset me because I didn't understand how or why he was still sending and writing these articles. I also received a call from [Officer J] who worked at [the Facility] who saw another article in the [Newspaper], she too was upset by the article. I do not understand why he is allowed to have access to these local newspapers. I am concerned for my safety when he is released that he may stalk me or attempt to locate me upon his release or attempt to contact me. I am not interested in him or want any contact with him. I have had no relationship with them or made no attempts to have any type of relationship with him. [Counselor] at [the Facility] informed me that [Inmate] told her that he was "in love with me and that there was nothing that he wouldn't do for me." I would like for you to talk to her. This is my statement.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>6</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>7</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>8</sup>

Group III offenses include, "violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*." The Agency has a "zero tolerance" regarding fraternization.

The Agency contends that Grievant acted contrary to Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*. The procedure "establishes rules of conduct that will be observed by employees when interacting with offenders under the direct supervision of the Virginia Department of Corrections."

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<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

To determine whether an employee acted contrary to Operating Procedure 130.1, the Hearing Officer must focus on the behavior of the employee. The behavior of an offender may provide context to the analysis but the key to determining whether an employee acted contrary to Operating Procedure 130.1 is the behavior of that employee. In this case, the Inmate was aware of personal information about Grievant. The Inmate's knowledge of personal information about Grievant is not, in itself, of significance. Only if Grievant provided that personal information to the Inmate does the Inmate's knowledge of Grievant's personal information become significant with respect to disciplinary action.

There are several ways an employee can act contrary to Operating Procedure 130.1. First, an employee who engages in fraternization acts contrary to Operating Procedure 130.1. Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders and engaging in romantic or sexual relationships with offenders.

Grievant did not fraternize with the Inmate. No credible evidence was presented to show that Grievant devoted excessive time or attention to the Inmate. No credible evidence was presented showing that Grievant discussed personal matters such as marriage, children, or work with the Inmate. No credible evidence was presented to show that Grievant engaged in a romantic or sexual relationship with the inmate. No credible evidence was presented showing that Grievant gave the appearance of these behaviors.

The Inmate was aware of personal information about Grievant. For example he knew her birthday. He knew the names of her children and where they went to school or where they worked. The Agency has not presented sufficient evidence to show that Grievant provided personal information to the Inmate.

It is unclear how the Inmate learned of Grievant's birthday. The Newspaper publishes the birthdates of individuals in the community. One of the documents found in the Inmate's possession was a list of names of individuals with birthdates published in the Newspaper. The Inmate could have learned of Grievant's birthday from the Newspaper. Grievant, however, testified that she attempted to determine whether her birthdate had been published by the Newspaper. She could not find where the Newspaper had published her birthday. Grievant testified that on at least two occasions, the Facility had circulated a list of employee birthdates. An Agency witness denied that the Facility circulated a list of employee birthdates. The Agency witness admitted that the Warden's practice was to give an employee candy and a card on his



or her birthday. The Agency asserted that the Inmate learned of Grievant's birthday from Grievant. No evidence was presented showing that Grievant told the Inmate of her birthday. Although it is possible that the Inmate learned of Grievant's birthday from Grievant, it is also equally likely that he learned the information from other sources. The Agency has not established that Grievant disclosed her birthday to the Inmate.

The Inmate could have learned about Grievant's daughter in high school from articles in the Newspaper about her. No credible evidence was presented to establish that Grievant informed the Inmate of personal information about her youngest daughter. The Inmate could have learned about Grievant's older daughter who worked in another Facility because that information was common knowledge among staff and others at the Facility. No credible evidence was presented to establish that Grievant informed the Inmate of personal information about her older daughter.

The Agency argued that Grievant had acknowledged that she engaged in personal conversations with the Inmate regarding her school age child and her adult daughter who worked at another Correctional Facility. The Agency did not present any evidence to support this allegation.

In short, no credible evidence was presented to establish that Grievant conveyed personal information about herself or her family to the Inmate.

Second, an employee acts contrary to Operating Procedure 130.1 when he or she engages in Improprieties. Improprieties are defined as:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, Standards of Conduct and Performance.

The Agency has not established an association between Grievant and the Inmate. Grievant did not provide the Inmate with personal information or take action that would establish a non-professional association with the Inmate. Grievant's failure to report to a supervisor her conversation with the Inmate in which he disclosed the Newspaper's ad, is not in itself, sufficient to establish the appearance of improprieties. Grievant told the Inmate not to repeat his behavior because she was annoyed with what he had done. The fact that Grievant was angered by the Inmate's action creates the appearance of an absence of an association or personal relationship.

Third, an employee acts contrary to Operating Procedure 130.1 by failing to report offender boundary violations. The Operating Procedure provides:

Employee Responsibilities – In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.

Placing an ad in the Newspaper to reflect romantic expectations was inappropriate behavior by the Inmate. He crossed the boundary of what constituted an appropriate relationship between offenders and corrections officers. Grievant was obligated by Operating Procedure 130.1 to report the Inmate's behavior to the Agency. Grievant failed to do so thereby acting contrary to Operating Procedure 130.1. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for violating Operating Procedure 130.1. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

*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>9</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, and (3) the disciplinary action was free of improper motive.

Grievant was obligated to report the Inmate's conversation with her when he disclosed he had placed an advertisement about her in the Newspaper. Grievant testified that she did not report the Inmate's action because she had been told by her building supervisor that she should "suck it up" with respect to inappropriate behavior by offenders directed towards her. She was discouraged from "writing up" inmates but was told to talk to them about their behavior. She reported an offender who exposed his genitals but the charges were not prosecuted. It is not surprising that female corrections officers might experience more attention than male corrections officers from male offenders. One of the purposes of Operating Procedure 130.1 is to minimize the amount of inappropriate attention by compelling employees to report inappropriate behavior by offenders. Placing an ad in a newspaper was an unusual and significant action by the Inmate. It exceeded the level of heightened attention a female

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<sup>9</sup> *Va. Code § 2.2-3005.*

correctional officer typically would expect working in an Institution with male offenders. Grievant should have reported the Inmate's behavior rather than putting up with it.

Grievant presented evidence suggesting Operating Procedure 130.1 was not followed with respect to other offenders. Those offenders were not similarly situated to Grievant. None had placed an ad in a newspaper showing affection for a corrections officer. Grievant has not established that the Agency inconsistently applied disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>10</sup>

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 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

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<sup>10</sup> This case is unfortunate. It is clear that Grievant was a valuable employee. She made one mistake that was contrary to a policy that could trigger a Group III Written Notice. The Agency chose to punish her with removal. Although the punishment appears harsh, it does not exceed the limits of reasonableness within the standard for mitigation set forth by the EDR Director.

Department of Employment Dispute Resolution  
600 East Main St. STE 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 all of your appeals 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 review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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>11</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of  
The Department of Corrections

January 9, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9654. For the reasons stated below, we will not interfere with the application of this hearing decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer state the following as relevant in his PROCEDURAL HISTORY:

On February 2, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On February 26, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case do to the unavailability of a party. On September 15, 2011, a hearing was held at the Agency's office.

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In his FINDINGS OF FACT, the hearing officer wrote the following:

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

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities until her removal effective February 2, 2009. The purpose of her position was to, "provide security and supervision of adult offenders at this facility." Grievant received training regarding the Agency's prohibition against fraternization with offenders. She had been employed by the Agency for approximately 12 years prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing. In September 2008, Grievant received an overall rating of Exceeds Contributor on her annual performance evaluation.

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the Locality. Employees at the Facility frequently are referenced in stories written in the Newspaper.

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On December 3, 2007, the Sergeant obtained a copy of a letter that the Inmate had written to the Newspaper seeking to place a personal ad. The ad was entitled "Girl of My Dreams." The Sergeant had obtained permission from the Assistant Warden to review the mail of the Inmate for illegal or unauthorized correspondence between the Inmate and correctional staff at the Facility.

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In January 2008, the Inmate approached Grievant and showed her the personal ad and told her it was directed at her. Grievant was offended by the Inmate's behavior and told him not to do anything like that again. The Inmate asked if she was going to report him. Grievant did not say anything and walked away. Grievant did not report the incident to a supervisor.

The Inmate was removed from the dormitories and placed in a segregation cell.

The Sergeant searched the Inmate's personal property and lockers and recovered numerous newspaper articles that were connected to employees at the Facility and the family members of those employees. For example, a picture in the Newspaper showed approximately 13 employees of the Facility who had "adopted" three local families for the Christmas holiday. The picture caption mentioned that the employees provided food items to help the families. The Inmate collected an article about a home the Warden had restored. One article showed the names of people involved in real estate transfers in the locality for November 2007. Another article showed the names and birthdays and anniversaries of individuals living in the Community.

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The Inmate was transferred to another Facility on April 11, 2008. The Inmate read that Grievant's father died in May 2008 and then placed an ad in a newspaper offering his condolences to Grievant. When Grievant learned of the Inmate's actions in June 2008, she was upset and became more fearful of the Inmate.

On October 31, 2008, Grievant met with Special Agent T for a second interview and statement. Grievant wrote:

[Special Agent T] questioned me regarding statements that [the Inmate] made indicating that I provided him with personal information such as my birthday and other personal information about my family. This is not true. I had never discussed my personal information with [Inmate] or anything about my family. It is common knowledge that I have a daughter who works at [Another Facility] and her name is [Name]. Her last name is not [Grievant's last name] however, it was [J] then [T], and now it is [J]. Many inmates have been to [the Facility] from [the Other Facility] that have come to me and other officers and have stated that they knew that I had a daughter that worked at [the Other Facility] but I've never told them that was true or denied it. My daughter's name as well as the rest of my family's name is always in the local newspaper. My family is well known in the local county. I have never discussed with [Inmate] anything about liking him or wanting to be in a relationship with him. I have never told [the Inmate] that [Sergeant M] and I were involved in a romantic or physical relationship however it is common knowledge at [the Facility] that [Sergeant M] and I have been involved in a relationship and are currently involved in a relationship. [Sergeant M] has never discussed our relationship with [Inmate] to my knowledge. In May when my father passed away, I saw an article [in] June in the [Newspaper B] that [Inmate] had written expressing his condolences for the loss of my father. This upset me because I didn't understand how or why he was still sending and writing these articles. I also received a call from [Officer J] who worked at [the Facility] who saw another article in the [Newspaper], she too was upset by the article. I do not understand why he is allowed to have access to these local newspapers. I am concerned for my safety when he is released that he may stalk me or attempt to locate me upon his release or attempt to contact me. I am not interested in him or want any contact with him. I have had no relationship with them or made no attempts to have any type of relationship with him. [Counselor] at [the Facility] informed me that [Inmate] told her that he was "in love with me and that there was nothing that he wouldn't do for me." I would like for you to talk to her. This is my statement.

In his CONCLUSIONS OF POLICY, the hearing officer stated the following:



Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

Group III offenses include, "violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*." The Agency has a "zero tolerance" regarding fraternization.

The Agency contends that Grievant acted contrary to Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*. The procedure "establishes rules of conduct that will be observed by employees when interacting with offenders under the direct supervision of the Virginia Department of Corrections."

To determine whether an employee acted contrary to Operating Procedure 130.1, the Hearing Officer must focus on the behavior of the employee. The behavior of an offender may provide context to the analysis but the key to determining whether an employee acted contrary to Operating Procedure 130.1 is the behavior of that employee. In this case, the Inmate was aware of personal information about Grievant. The Inmate's knowledge of personal information about Grievant is not, in itself, of significance. Only if Grievant provided that personal information to the Inmate does the Inmate's knowledge of Grievant's personal information become significant with respect to disciplinary action.

There are several ways an employee can act contrary to Operating Procedure 130.1. First, an employee who engages in fraternization acts contrary to Operating Procedure 130.1. Fraternization is defined as:

The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders and engaging in romantic or sexual relationships with offenders.

Grievant did not fraternize with the Inmate. No credible evidence was presented to show that Grievant devoted excessive time or attention to the Inmate. No credible evidence was presented showing that Grievant discussed personal matters such as marriage, children, or work with the Inmate. No credible evidence was presented to show that Grievant engaged in a romantic or sexual relationship with the inmate. No credible evidence was presented showing that Grievant gave the appearance of these behaviors.

The Inmate was aware of personal information about Grievant. For example he

knew her birthday. He knew the names of her children and where they went to school or where they worked. The Agency has not presented sufficient evidence to show that Grievant provided personal information to the Inmate.

It is unclear how the Inmate learned of Grievant's birthday. The Newspaper publishes the birthdates of individuals in the community. One of the documents found in the Inmate's possession was a list of names of individuals with birthdates published in the Newspaper. The Inmate could have learned of Grievant's birthday from the Newspaper. Grievant, however, testified that she attempted to determine whether her birthdate had been published by the Newspaper. She could not find where the Newspaper had published her birthday. Grievant testified that on at least two occasions, the Facility had circulated a list of employee birthdates. An Agency witness denied that the Facility circulated a list of employee birthdates. The Agency witness admitted that the Warden's practice was to give an employee candy and a card on his or her birthday. The Agency asserted that the Inmate learned of Grievant's birthday from Grievant. No evidence was presented showing that Grievant told the Inmate of her birthday. Although it is possible that the Inmate learned of Grievant's birthday from Grievant, it is also equally likely that he learned the information from other sources. The Agency has not established that Grievant disclosed her birthday to the Inmate.

The Inmate could have learned about Grievant's daughter in high school from articles in the Newspaper about her. No credible evidence was presented to establish that Grievant informed the Inmate of personal information about her youngest daughter. The Inmate could have learned about Grievant's older daughter who worked in another Facility because that information was common knowledge among staff and others at the Facility. No credible evidence was presented to establish that Grievant informed the Inmate of personal information about her older daughter.

The Agency argued that Grievant had acknowledged that she engaged in personal conversations with the Inmate regarding her school age child and her adult daughter who worked at another Correctional Facility. The Agency did not present any evidence to support this allegation.

In short, no credible evidence was presented to establish that Grievant conveyed personal information about herself or her family to the Inmate.

Second, an employee acts contrary to Operating Procedure 130.1 when he or she engages in Improprieties. Improprieties are defined as:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, *Standards of Conduct and Performance*.

The Agency has not established an association between Grievant and the Inmate.

Grievant did not provide the Inmate with personal information or take action that would establish a non-professional association with the Inmate. Grievant's failure to report to a supervisor her conversation with the Inmate in which he disclosed the Newspaper's ad, is not in itself, sufficient to establish the appearance of improprieties. Grievant told the Inmate not to repeat his behavior because she was annoyed with what he had done. The fact that Grievant was angered by the Inmate's action creates the appearance of an absence of an association or personal relationship.

Third, an employee acts contrary to Operating Procedure 130.1 by failing to report offender boundary violations. The Operating Procedure provides:

Employee Responsibilities - In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.

Placing an ad in the Newspaper to reflect romantic expectations was inappropriate behavior by the Inmate. He crossed the boundary of what constituted an appropriate relationship between offenders and corrections officers. Grievant was obligated by Operating Procedure 130.1 to report the Inmate's behavior to the Agency. Grievant failed to do so thereby acting contrary to Operating Procedure 130.1. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for violating Operating Procedure 130.1. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

*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 ...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 nonexclusive 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 was obligated to report the Inmate's conversation with her when he disclosed he had placed an advertisement about her in the Newspaper. Grievant testified that she did not report the Inmate's action because she had been told by her building supervisor that she should "suck it up" with respect to inappropriate behavior by offenders directed towards her. She was discouraged from "writing up" inmates but was told to talk to them about their behavior. She reported an

offender who exposed his genitals but the charges were not prosecuted. It is not surprising that female corrections officers might experience more attention than male corrections officers from male offenders. One of the purposes of Operating Procedure 130.1 is to minimize the amount of inappropriate attention by compelling employees to report inappropriate behavior by offenders. Placing an ad in a newspaper was an unusual and significant action by the Inmate. It exceeded the level of heightened attention a female correctional officer typically would expect working in an Institution with male offenders. Grievant should have reported the Inmate's behavior rather than putting up with it.

Grievant presented evidence suggesting Operating Procedure 130.1 was not followed with respect to other offenders. Those offenders were not similarly situated to Grievant. None had placed an ad in a newspaper showing affection for a corrections officer. Grievant has not established that the Agency inconsistently applied disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action."

In his DECISION, the hearing officer wrote the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

### **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. 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.

In her appeal to this Agency, the grievant contends that the hearing officer erred in his findings of fact and that if no fraternization occurred, there was no basis to support the issuance of the Group III Written Notice with termination. The grievant also raised concerns that because management officials were aware of certain newspaper articles that the inmate had written concerning the grievant's private life, there was no need for the grievant to report that to management. Please note that the objections put before this Agency were also raised in an appeal to the Department of Employment Dispute Resolution (EDR) and were addressed appropriately by EDR.

The DHRM concludes that the hearing officer did not violate any human resource management policy. Rather, it appears that the grievant is disagreeing with the hearing office's assessment of the evidence and the conclusions he drew as a result of that assessment. Therefore, this Agency has no basis to interfere with the application of this decision.

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Ernest G. Spratley  
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