

Issue: Group III Written Notice with Suspension and Transfer (fraternization); Hearing
Date: 08/15/11; Decision Issued: 08/18/11; Agency: DOC; AHO: John V.
Robinson, Esq.; Case No. 9659; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9659

Hearing Officer Appointment: July 13, 2011

Hearing Date: August 15, 2011

Decision Issued: August 18, 2011

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued April 22, 2011 by Management of Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A dated April 29, 2011.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on July 21, 2011 at 10:00 a.m. The Grievant, the Agency’s advocate and the hearing officer participated in the call. The Grievant confirmed he is seeking the relief requested in his Grievance Form A.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on July 22, 2011 (the “Scheduling Order”), which is incorporated herein by this reference.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹. The hearing officer used the recording equipment and tapes supplied by the Agency.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

¹ References to the agency’s exhibits will be designated AE followed by the exhibit number.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is employed as a Correctional Officer (“C/O”) by the Agency at a level 3 security correctional facility (the “Facility”) which incarcerates a large number of inmates who are serving life sentences.
2. Security and safety at the Facility of staff, offenders and the public are paramount. Fraternalization is strictly prohibited because it can compromise the integrity of the institution and staff and can lead to other serious issues and problems for the Facility such as violations of Agency policies concerning safety/security and litigation against the Department.
3. As a C/O, the Grievant is responsible, amongst other things, for providing “security, custody, and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmate’s daily activities and observers and records their behavior and movement to ensure their safe and secure confinement.” AE 4. The purpose of the Grievant’s position is to “provide security, custody, and control over inmates according to post orders. Departmental and Institutional Operating Procedures.” AE 4.
4. The Grievant was hired by the Department on April 25, 1998. AE 1.
5. On March 12, 2011, before the 11:00 a.m. count, the Grievant approached Offender M from behind and put his right arm around the offender’s neck, while the offender was seated.
6. Offender M stood up and pushed the Grievant in the face to break free.
7. The Grievant admits that he went to Offender M’s cell during count to apologize and admits that he encouraged the offender not to reveal any information surrounding the incident.

8. C/O F and 3 inmates corroborate Offender M's version of the incident.
9. Offender M in his signed written statement admits that while the Grievant's arm around his neck was tensed, "it did not hurt me." AE 2, B1.
10. Offender M also told the Grievant's superior officers that ". . . I don't have any problem with [the Grievant]." AE 2, B2.
11. The other inmates who observed the incident and Offender M were upset by the incident.
12. The Grievant received a Group III Written Notice with a 10-day suspension and a disciplinary transfer to a nearby facility, in part also for safety reasons. The Grievant was not demoted.
13. The Grievant admits that he touched Offender M on the shirt. While denying that Offender M touched his face, the Grievant admits that Offender M put his "hand in my face," a few inches away from his face.
14. The Grievant contends that the Department has blown the matter out of proportion, that the incident does not amount to a "hill of beans" and that the punishment is unjust and too harsh.
15. The Grievant has received extensive training and education throughout his employment with the Agency concerning the Agency's fraternization policies.
16. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the “SOC”) are contained in Agency Operating Procedure 135.1 (“Policy No. 135.1”). AE 5. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

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 DHRM Policy 1.60, Standards of Conduct, management is given 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.*

Pursuant to Policy No. 135.1, the Grievant’s conduct could clearly constitute a terminable offense, as asserted by the Agency. Here, the Agency elected not to terminate but instead mitigated the disciplinary sanction to 10 days suspension of a possible 30 and the disciplinary transfer. Clearly, the punishment is not too harsh or unjust.

Policy No. 135.1 provides in part:

XII. THIRD GROUP OFFENSES (GROUP III):

A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

B. *Group III* offenses include, but are not limited to:

.....

25. violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*

.....

31. fraternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from Department custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Director on a case by case basis (*see* Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*).

Department Operating Procedure Number 130.1 (*Rules of Conduct Governing Employee's Relationship With Offenders*) provides in part as follows:

Offender – An inmate, probationer, parolee or post release supervisee or other person placed under the supervision or investigation of the Department of Corrections.

IV. PROFESSIONAL CONDUCT Employees of the Department shall exercise a high level of professional conduct when dealing with offenders to ensure the security and integrity of the correctional process.

A. *Abuse of Employment Status.* Employees shall not use their official status as employees of the DOC as a means to establish social interactions or business relationships not directly related to Department business. . .

V. IMPROPRIETIES: NON-PROFESSIONAL ASSOCIATION

A. *Fraternization.* Fraternalization 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 the 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.

B. *Improprieties.* 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. A "fraternization" brochure had been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies (see Attachment #1). . . .

VII. EMPLOYEE AND SUPERVISORY REPORTING RESPONSIBILITIES

A. 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.

AE 4.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning fraternization constituted a Group III Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's service to the Agency;
2. the fact that the Grievant received an overall rating of "Contributor" in his most recent performance evaluation (AE 4); and
3. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-

1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. 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. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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 DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given 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.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a

state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the disciplinary action of the Agency concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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, Virginia 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 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).