Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 11/19/11; Decision Issued: 12/08/11; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9716; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 12/20/11; EDR Ruling No. 2012-3201 issued 03/08/12; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9716

Hearing Date: November 29, 2011
Decision Issued: December 8, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on September 1, 2011 for:

> Grievant fraternized with a recently-released offender who was currently on supervised probation during the time of the fraternization. Grievant and the offender began to see each other on a regular basis shortly after the offender's release from custody in July of 2010. The offender assisted Grievant with her personal computer, they were "friends" on the social media website, Facebook, and they visited in each other's homes. Such fraternization violated Operating Procedure 130.1, which prohibits fraternization or non-professional relationships with offenders within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last. [1]

Pursuant to the Group III Written Notice, the Grievant was terminated. [2] On September 12, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On November 7, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On November 29, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Grievant
Witnesses

ISSUE

1. Did the Grievant violate the terms of Virginia Department of Corrections Operating Procedure 130.1, in that she fraternized with an offender within the 180 day time frame after his discharge?
2. Was the Grievant's punishment comparable to that given by this Agency to another employee for a similar offense?

[1] Agency Exhibit 1, Tab 1, Pages 1 through 2
[2] Agency Exhibit 1, Tab 1, Page 1
[3] Agency Exhibit 1, Tab 1, Page 3

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 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. [4] However, proof must go beyond conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

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 six (6) tabbed sections and that notebook was accepted without objection as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing four (4) tabbed sections and that notebook was accepted without objection as Grievant Exhibit 1.

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[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The essential facts in this matter are undisputed. In July of 2010, Offender A was released from the custody of the Department of Corrections. Subsequent to that release, Offender A and the Grievant began to see each other, visit each other's homes and were "friends" on Facebook. The Grievant, in her testimony, did not deny these contacts with Offender A. In her Second Step, the Grievant stated that, "I did err in not asking for an exception as outlined in policy although this was not intentional." [7] Further, when the Grievant was interviewed by the Special Agent who collected information in this matter, she stated as follows:

> I have known Offender A since the 1990's. When he was incarcerated, I did not communicate with him at all. When he was released, I did not think about any pending probation or anything for that matter. I now realize that I cannot communicate with him for the next year or so.
>
> We are friends, not friends with benefits. We have never been sexually involved. He contacted me when he was released. [8]

Within the appropriate 180 day time frame of his release from custody, Offender A maintained a page on Facebook which indicated that the Grievant was one of his friends. [9] Offender A maintained this Facebook page under an assumed name. Likewise, within the appropriate 180 day time frame of his release, the Grievant maintained a page on Facebook showing Offender A as one of her friends. [10]

Operating Procedure Policy 130.1(III), defines Fraternization as follows:

> 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. [11]

Operating Procedure Policy 130.1(V)(A), states as follows:

> 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

[7] Agency Exhibit 1, Tab 1, Page 7
[8] Agency Exhibit 1, Tab 2, Sub-tab B, Page 3
[9] Agency Exhibit 1, Tab 2, Sub-tab L, Page 1
[10] Agency Exhibit 1, Tab 2, Sub-tab L, Page 3
[11] Agency Exhibit 1, Tab 3, Page 1

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. [12] (Emphasis added)

Finally, Operating Procedure 130.1(V)(B) states as follows:

> 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 has been developed that provides information about indicators of inappropriate relationships between employees and offenders and prevention strategies. [13] (Emphasis added)

It is clear from the testimony introduced before the Hearing Officer, that the Grievant was aware of the rules against fraternization and it is equally clear that she did, in fact, fraternize with Offender A within 180 days of his release from custody. The Hearing Officer finds that the Agency has bourne its burden of proof regarding the issue of fraternization.

During the course of her testimony, the Grievant introduced evidence regarding potential disparate treatment regarding another corrections officer and a violation of Operating Procedure 130.1, regarding fraternization. [14]

The Warden for this facility was called as a witness for the Agency. During cross-examination by the Grievant, he indicated that the reason that punishment was different in these two (2) matters was, that in the matter of Corrections Officer B, that corrections officer came to him to self-report the fraternization. The Warden indicated that was the sole distinction between these two (2) cases. Further, the Warden testified, that, "**The Investigator has already found the Grievant guilty**." In the matter of Corrections Officer B, in March of 2009, the Warden received an e-mail from a Probation Officer. This email indicated that Corrections Officer B was in a relationship with one (1) of the Probation Officer's offenders. On July 28, 2009, the Warden responded to the Probation Officer in part as follows:

> ...In your letter of March 2009, you advised me of a relationship between one of our employees [Corrections Officer B] and one of your probationary offenders (Offender C) residing together.

[12] Agency Exhibit 1, Tab 3, Page 2
[13] Agency Exhibit 1, Tab 3, Page 3
[14] Grievant Exhibit 1, Tab C, Pages, 3, 6 and 7

> I did meet with [Corrections Officer B]. [Corrections Officer B] reported that she did not know [Offender C] was on supervised probation until you all had an opportunity to talk. I advised her at the meeting she had to stay away from [Offender C] until her supervised conditions of probation were satisfied. She agreed to our conversation, due to the impact it could have on her employment. [15]

Accordingly, Corrections Officer B, who was living with a released offender within the 180 day time frame, was given the opportunity to cease that living arrangement and to continue employment. She did not receive a Group III, a Group II or a Group I Written Notice.

Subsequently, Corrections Officer B was found to still be living with Offender C. A disciplinary hearing was held on February 18, 2010, and at that disciplinary hearing, the Warden stated in part as follows:

> [Warden] stated to [Corrections Officer B] that one year ago they had met and he told her that an email had been received from [Probation Officer D] who advised that she was living with [Offender C]. Warden stated that Corrections Officer B advised then that she was not aware that [Offender C] was on probation but she would make plans for her to move out of her residence and sever ties with her. [Warden] stated that he took [Corrections Officer B's] word for it and did not contact anyone outside of the institution and handled the situation here. [16]

It is clear that Corrections Officer B was in fact living with the released offender. It is equally clear that she did not come to the Warden prior to the Warden's knowledge of her violation of Operating Procedure 130.1. It is clear that her coming to the Warden was precipitated by a probation officer's letter to the Warden.

The only significant difference that the Hearing Officer finds in these two (2) matters is that, in the matter before the Hearing Officer, the Warden apparently deemed that the Grievant was guilty as, "**The Investigator had already found the Grievant guilty**." Of course, the Warden failed to grasp the fact that it is not the Investigator's job to determine guilt or innocence.

Virginia Department of Corrections Operating Procedure 135.1, sets forth the Standards of Conduct that apply to this Agency. Policy 135.1(III), states in part as follows, regarding Progressive discipline:

> A system of increasingly significant measures that are utilized to provide feedback to employees so that they can correct conduct or performance problems. It is most successful when provided in a way that helps an employee become a fully contributing member of the organization. Progressive discipline also enables agencies to **fairly**, and with reliable documentation, terminate an employee who is **unable or unwilling** to

[15] Grievant Exhibit 1, Tab C, Page 3
[16] Grievant Exhibit 1, Tab C, Page 6

improve his or her workplace conduct or job performance. [17] (Emphasis added)

Further, Policy 135.1(IV)(B)(1), states as follows:

> Establish a **fair** and objective process for correcting or treating unacceptable conduct or work performance. [18] (Emphasis added)

The Agency offered no testimony other than the Warden's statement that, "**The Investigator had already found the Grievant guilty**," to distinguish between these two (2) events of fraternization. On it's face, the matter with Corrections Officer B was more serious as she was in fact living with the offender. In the case before this Hearing Officer, there was no evidence of sexual activity or any other activity other than a Facebook reference and the admission by the Grievant that she has been in the offender's home and he in her's.

The Agency introduced no evidence of prior fraternization by this Grievant that was not previously authorized nor did it introduce evidence of any other counseling sessions and/or Written Notices for any other matters regarding this Grievant. The Agency did introduce evidence to indicate that the Grievant's overall rating was that of a "Contributor." [19] The Agency did not introduce any evidence that the Grievant was **unable or unwilling** to improve her workplace conduct or job performance.

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..." [20] 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 Agency, in this matter, offered no testimony whatsoever regarding its consideration of mitigating factors. Indeed, the Written Notice which was issued on September 1, 2011, leaves Section IV, that would have dealt with Mitigation, completely blank. [21] While the Hearing

[17] Agency Exhibit 1, Tab 6, Page 2
[18] Agency Exhibit 1, Tab 6, Page 3
[19] Agency Exhibit 1, Tab 4, Page 7
[20] Va. Code § 2.2-3005
[21] Agency Exhibit 1, Tab 1, Page 1

Officer is aware that it is extremely rare for mitigating factors to negate a termination, the Hearing Officer does point out that this Grievant was a longtime employee with this Agency with no prior issues that were brought forward by the Agency to the Hearing Officer.

Further, under the *Rules for Conducting Grievance Hearings*, inconsistent discipline issued to similarly situated employees can be viewed as a mitigating circumstance. [22] If one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum, or nothing at all, for the same confirmed misconduct, a hearing office may consider the disparity in the discipline as a potential mitigating circumstance. [23] The key is that the misconduct be of the same character. [24]

In EDR Ruling No. 2010-2376, [the Director of EDR] explained that if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum or nothing at all for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance. [25] As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. [26]

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter in that the Grievant fraternized with an offender in violation of Policy 130.1. However, the Hearing Officer also finds that the Grievant has bourne her burden of proof in this matter in that she has established that the Agency, for a similar incident and for the same violation, disparately punished her in relationship to Corrections Officer B. Accordingly, the Hearing Officer directs that the Agency mitigate the Group III Written Notice to the exact same punishment that was given to Corrections Officer B, no punishment.

The Grievant did not ask to be reinstated to her former position with the Agency. She asked to be given the opportunity to retire. [27] Accordingly, the Hearing Officer directs that the Agency allow the Grievant to retire with an effective date of August 31, 2011. The Grievant shall be paid all pay and benefits as if she had retired from this Agency on August 31, 2011, and all of Grievant's records with this Agency shall now reflect that she retired from this Agency and was not terminated from this Agency.

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:

[22] Administrative Review of Director, Ruling No. 2010-2376
[23] Administrative Review of Director, Ruling No. 2010-2376
[24] Administrative Review of Director, Ruling No. 2010-2376
[25] Administrative Review of Director, Ruling No. 2011-2823, 2011-2833
[26] Administrative Review of Director, Ruling No. 2011-2823, 2011-2833
[27] Grievant Exhibit 1, Tab A, Page 6

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 14th Street, 12th 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.[28] 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.[29]

[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]

_____
William S. Davidson
Hearing Officer

[28] 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).

[29] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.