

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 03/14/16; Decision Issued: 04/09/16; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10735; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/24/16; EDR Ruling No. 2016-4345 issued 06/01/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 04/24/16; DHRM Ruling issued 06/22/16; Outcome: AHO's decision affirmed.**

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10735

Hearing Date: March 14, 2016

Decision Issued: April 9, 2016

SUMMARY OF DECISION

The Agency had found that Grievant engaged in fraternization. The Agency then issued Grievant a Group III Written Notice with removal. The Hearing Officer has found Grievant engaged in the misconduct. In addition, the Agency's discipline is consistent with policy/law and reasonable. Thus, the Hearing Officer has upheld the discipline.

HISTORY

On September 8, 2015, the Agency issued Grievant a Group III Written Notice with termination for fraternization. On November 12, 2015, Grievant timely filed her grievance to challenge the Agency's action. Thereafter, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal, effective December 4, 2015. A prehearing conference ("PHC") was held on December 18, 2015, and an order addressing topics discussed during that PHC was issued on December 21, 2015. The grievance hearing was held on March 14, 2016.¹

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. First, Grievant objected to the Agency's Exhibit 3, pages 78, 80, 82, 84, 86, 91, and 92. Grievant's Advocate argued that pages 78 and 80 could not be authenticated. She argued that page 82 could not be authenticated and contained an incomplete letter. In addition, Grievant's Advocate contended that pages 86 through 89 were not relevant. Moreover, Grievant's Advocate averred that page 91 was too difficult to read and page 92 was irrelevant and an incomplete letter. The Agency's Advocate argued that the forenamed pages were attachments to the investigative report that resulted in Grievant's termination. After considering the arguments of the parties, the Hearing Officer overruled Grievant's objections. Next, the Agency's Advocate objected to certain proposed exhibits of Grievant that were provided to the Agency one business day before the scheduled hearing. Finding the submission of the proposed exhibits untimely,² the Hearing Officer sustained the Agency's objection.

The Hearing Officer admitted the Agency's binder consisting of Agency Exhibits 1 through 4. Grievant's binder, consisting of Grievant's Exhibits 1 through 14 was also admitted.

¹February 9, 2016, was the first date available and set for the hearing. Thereafter, due to an emergency the Agency's Advocate moved for a continuance. The Grievant did not object. For good cause, the hearing was rescheduled for March 14, 2016, a date agreeable to the parties.

² Under the scheduling order issued on December 21, 2016, the parties were required to exchange their exhibits and witness list no later than February 2, 2016.

At the hearing, both parties were given the opportunity to make opening statements and call witnesses. Also, each party was provided the opportunity to cross examine any witnesses presented by the opposing party. Both parties were given an opportunity to make closing statements. They elected to do so in writing and submitted their written closing arguments on March 21, 2016.

During the hearing, each party was represented by an attorney.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (5 witnesses)
Advocate for Grievant
Witnesses for Grievant (7, including Grievant)

ISSUE

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact³:

1. The Agency is a prison within the Department. Grievant had been employed for about 18 months as a teacher for the Agency. She taught an adult basic education class for inmates. The inmates are also referred to as offenders by the Agency. Although adults, the academic grade level that the offenders were functioning on in Grievant’s class was between grades 1 through 7. Grievant’s class was the precursor to the inmates’ GED class. She taught 4 classes with 15 students in each one. (A Exh.3, p. 8; Testimony of Grievant).
2. Offender was a student of Grievant and attended her adult basic education class several times a week. (Testimonies of Principal, Institutional Investigator, and Grievant).
3. Several inmates at the prison are Muslims. Thus, to promote a better understanding of

³ Due to his being ill on the day of the hearing , Institutional Investigator testified by telephone. Grievant did not object to this form of testimony.

Muslim practices, on September 2, 2015, the Agency offered staff a seminar about Muslims. In lieu of teaching that day, Grievant attended the seminar along with about 30 other staff members. In addition to Grievant, those attending included, among others, the Institutional Investigator. He observed Grievant's presence in the class. (Testimony of Grievant and Institutional Investigator).

4. On August 31, 2015, The Agency/Institution's Investigator received an anonymous note, referred to as a "Kite," indicating that Offender may be involved in a romantic relationship with Grievant. (Testimony of Institution's Investigator; A Exh. 3, pp. 14, 30).

Institutional Investigator has six years of investigative training. Two of those years have been as the prison's internal investigator. Based on his experience, Institutional Investigator has learned that when an anonymous report of wrongdoing is made, usually there is substance to the reported misconduct. Thus, Institutional Investigator commenced an investigation regarding the allegation in the Kite. As such, on September 3, 2015, Offender was removed from Grievant's class and strip searched. During this aspect of the investigation, a hand written letter was found on Offender in his shirt pocket. The letter was written in purple ink. After reviewing the letter, the Agency concluded it was a love note. This writing was unsigned; however, when Offender was interviewed during the furtherance of the investigation, Offender stated that he had received the note from Grievant. Grievant was known to write using colored ink, including ink that was purple. (Testimony of Institution's Investigator).

5. The first 15 lines of the above-referenced love note read as follows:

Hey,
Sitting here in this boring seminar on Muslim. I'm actually ...
writing w/one eye opened and one closed. Hatta [smiley face] I'd
rather (sic) up on my feet working. I can't (sic) still too long. I
had a dream about you last night. Pretty much most of the night.
We were at a hotel having fun, but for some reason you would
never cum. So in my dream, I didn't think you enjoyed. But
anyway, I miss you! Miss seeing your big smile showing every
part of your mouth! You're so sweet boy! I just love you! Bae
why do you love me? Have you thought about the reasons? Have
you really truly thought of the reason you are in love w/BaeBae?

...

(A Exh. 3, p. 68).

6. As the letter continues, it indicates - among other things - the contemplation of marriage between the author of the letter and the person to whom the letter is addressed. The letter ends with "Well Bae, Love you Mama's Baby! Love u Boy." (A Exh. 3, p. 68).

7. After locating the referenced letter on Offender during the internal search, next Institutional Investigator excused Grievant's students from her class. Grievant was presented with the letter. The evidence is insufficient to determine if Grievant actually held the letter as it was shown to her. Neither is it clear whether Grievant read the contents of the letter when it was

first presented to her. Grievant was asked about the letter, and she denied writing it. (Testimonies of Institution's Investigator and Grievant; A Exh. 2, p. 4).

8. Next, because Institutional Investigator was of the view that Grievant was a threat due to her possibly fraternizing with an inmate, he escorted Grievant to Human Resources where she was placed on pre-disciplinary leave and then escorted out of the prison. (A Exh. 3, p. 30; Testimony of Institutional Investigator; G Exh. 7).

9. As the internal investigation pursued, the institutional investigator, an officer and sergeant proceeded to search Grievant's classroom. During the search, the investigator had to pry open a desk drawer of Grievant because it was locked. Once access was obtained, the book *Fifty Shades of Gray* was found in the drawer. The book had been banned from the premises of the Agency due to its sexual nature. A love letter was also located inside the book. The Agency believed this letter was from Offender to Grievant as the Agency found the handwriting in the love letter similar to Offender's. In addition when Offender was interviewed, Offender stated he wrote the love note found in the book. (Testimony of Institutional Investigator; A Exh. 3, pp. 9 and 82).

10. In addition, during the search a torn up poem was found in the trash can in Grievant's class. The Agency also believed this poem was written by Offender as the hand writing was similar to his. (A Exh. 3, pp. 9 and 84; Testimony of Institutional Investigator).

11. Grievant acknowledged that the book belonged to her. The evidence establishes that Librarian gave the book to Grievant anonymously about six weeks before the commencement of the investigation. Librarian had put the book in Grievant's mailbox without a note as to who gave it to Grievant. Librarian gave the book to Grievant as a joke because Grievant's sister was getting married soon. Grievant became aware that Librarian gave her the book after Grievant's termination. Grievant stated that she was unaware of the book's content. (Testimonies of Grievant and Librarian).

12. During the search of Grievant's classroom, the Agency also obtained Grievant's Muslim training book that she received while in attendance at the seminar the previous day. The booklet contained a purple writing pen and handwriting in purple ink known to be Grievant's. This handwriting was also similar or identical to that found in the letter found on Offender. (A Exh. 3, pp. 68, 70-75). Institutional Inspector obtained from Grievant's classroom other writings known to be Grievant's. One such writing was Grievant's "Lockdown Log" notations which Grievant acknowledged was written by her. (Testimonies of Institutional Investigator and Grievant).

13. In addition to the internal investigation conducted, the Special Investigation Unit (SIU) investigated the fraternization allegation. (Testimony of Special Agent 2). The SIU is a state wide investigative unit of the Commonwealth of Virginia Department of Corrections. (A Exh. 3; G Exh. 4). During the (SIU) investigation, Offender stated that he was in a "relationship" with Grievant, that it had persisted for about two weeks, that the two had exchanged letters, and that he was aiming to have sexual relations with Grievant. (A Exh. 3, pp. 9, 31; Testimony of Institutional Investigator).

14. A comparison of hand writing known to be that of Grievant and of the letter found on Offender indicates that the writing in question was Grievant's. (Hearing Officer's comparison of letter found on Offender; Grievant's Lockdown Log; and Grievant's handwriting samples found in Agency Exhibit 3, pages 70- 78 and in Grievant's Exhibits 6 and 12).

15. A forensic scientist with the Commonwealth of Virginia Department of Forensics Science analyzed the writing in question and known handwriting samples of Grievant. Then the forensic scientist determined on November 23, 2015, that the love note found on Offender was written by Grievant. (A Exh. 3, pp. 96-99).

16. During the investigation(s), pictures of a wedding dress and rings were located in the single cell of Offender. Offender claimed he received them from Grievant. Grievant denied such. The evidence is insufficient to establish that the wedding pictures located in Offender's cell were given to him by Grievant. (Testimonies of Grievant and Institutional Investigator; A Exh. 3, pp. 86, 88, and 89; G Exh. 4).

17. During the investigation(s), the Agency also was informed that Grievant visited the home of Offender's family and represented that Grievant and Offender were planning to marry once he is released. The evidence is insufficient to establish the allegation. (Testimony of Lieutenant; A Exh. 4).

GROUP NOTICE ISSUED

18. On October 27, 2015, the Agency issued Grievant a Group III Written Notice with termination. The Agency did so after considering, among other things, the preliminary investigation it had conducted, including but not limited to, the handwriting samples known to be those of Grievant and the letter found in Offender's possession. In consideration, it also reviewed interviews that had been conducted with Grievant. In addition, among other things, it considered that Grievant had attended the Muslim seminar and regularly used pens with colored ink when writing, including a purple pen. The Agency believed it met the standard to discipline Grievant for fraternization. This was so even though the Agency did not have the hand writing certificate of analysis back confirming that Grievant wrote the letter found on Offender's person. (Testimonies of Warden and Assistant Warden).

The group notice issued describes the nature of the offense as follows:

Upon completion of investigation, you violated OP 135.1. Standards of Conduct and OP 130.1, Rules of Conduct Governing employee Relationships with Offenders based on your fraternization with an offender. Fraternization is employee association with offenders, or their family members, outside of employee job functions that extends to unacceptable, unprofessional, and prohibited behavior. A handwritten letter was recovered in your handwriting that included ***See attached***

... discussion of "being at a hotel and having fun," marriage, and how much you

miss the student/offender. The letter was sexual in nature.

(A Exh. 1, pp. 1-2; G Exh. 11, pp. 30-31; Testimony of Assistant Warden).

POLICIES

19. Fraternalization with offenders is precluded by Agency policies 130.1. (A Exh. 3, p. 118 and A Exh. 3, pp. 133-135).

20. The Agency had discussed Policies 130.1 and 135.1 with Grievant and she had received the policies when she was initially employed by the Agency. Subsequently, the Agency had provided Grievant, as well as other employees, with routine reminders of the policies. Thus, prior to the love letter being written that was found on Offender's person, Grievant had knowledge of Agency policies 130.1 and 135.1 (A Exh. 3; Testimony of Warden).

219. Policy 130.1 defines "fraternization" as follows:

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior. Examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.

(A Exh. 3, p. 118; G Exh. Tab 3, Policy 130.1, p. 1).

21. Under Policy 135.1, fraternization with an inmate is a Group III offense which normally warrants termination. (A Exh. 3, pp. 133-135).

OTHER

22. On October 13, 2015, Principal attended Grievant's due process/administrative hearing in support of Grievant. He was shown the letter whose handwriting was in question. At the conclusion of the hearing, Principal was of the belief that Grievant should receive no more than a Group II Written Notice and maintain her job. (Testimony of Principal).

23. Grievant often wrote with colored pens. And she had more than one purple writing pen. On September 1, 2015, Grievant reported to co-workers and her supervisor that a purple pen and a pink pen belonging to her were missing and possibly stolen. Grievant believed that in the past her students/aide may have taken materials from her desk. (Testimony of Grievant; G Exh. 13).

24. Grievant's annual performance evaluation in 2014 rated her as "exceeds contributor." (G Exh. 2, p. 13). At the time she was terminated, Grievant had never been disciplined by the Agency. (Testimony of Grievant).

25. Grievant has reported that she is happily married in a 16 year marriage. (Testimony of

Grievant; A Exh. 2, p. 4).

26. Grievant helped her sister plan a wedding that took place August 15, 2015. This date was prior to Grievant being placed on administrative leave by the Agency. (Testimony of Grievant; G Exh. 4).

27. Grievant as well as other teachers at the Agency sometimes meet one on one outside of the classroom with inmates who are their students. These meetings usually last no more than 5 to 10 minutes. The reason a one on one meeting may be appropriate is because the teacher may need to speak with a student/inmate about a class related matter that may embarrass the inmate if discussed with him in an open class with other students present. During this type meeting the classroom door is usually left open while the meeting takes place just outside the classroom.

Topics that may be necessary to discuss in such a meeting include, attendance, class behavior, and student progress. (Testimony of Grievant).

Grievant did meet one on one with Offender as well as other inmates on a regular basis. Topics she discussed with Offender during these meetings included his being distracted in class, frequently going to study hall, and inappropriate behavior. Some of these meetings were videoed. They possibly lasted 5 to 10 minutes. (Testimony of Grievant).

29. Although some of the drawers to Grievant's classroom desk could not be locked, the one where investigators found *Fifty Shades of Gray* could be locked. (Testimonies of Grievant and Institutional Investigator).

30. Several of Grievant's co-workers testified that Grievant was a good teacher, showed her students respect, and was of high moral character. (Testimonies of Principal, Correctional Officer, Teacher 1, Teacher 2, Librarian, and Administrative Assistant). The Agency stipulated that Grievant was a good teacher and had no disciplinary record.

31. Grievant testified that she did not obtain her own handwriting analysis because the SIU investigator indicated it was not needed. (Testimony of Grievant).

32. About two weeks before Grievant was placed on pre-disciplinary leave, she and Warden had an unpleasant exchange of words. (Testimonies of Warden and Administrative Assistant).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her 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 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.⁴

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth’s Standards of Conduct and disciplinary process that the Department of Corrections (“DOC”) must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁵

These standards group offenses in three categories – Group I, Group II, and Group III offenses. The least severe are noted as Group I violations of workplace conduct; Group II offenses are more severe; and Group III offenses are the most severe normally warranting termination for a first offense.⁶ When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.⁷

As stated previously, Agency management issued Grievant a Group III Written Notice with termination. The Hearing Officer examines the evidence to determine if the Agency’s discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

Under Agency Policy 135.1, fraternization with an inmate is a Group III offense which normally warrants termination.

Moreover, Agency Policy 130.1 defines “fraternization” as follows:

⁴ Grievance Procedural Manual §5.8

⁵ Virginia Department of Corrections Operating Procedure 135.1

⁶ Virginia Department of Corrections Operating Procedure 135.1(V).

⁷ *Id.*

Employee association with offenders, or their family members, outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior. Examples include non-work related visits between offenders and employees, non-work related relationships with family members of offenders, discussing employee personal matters (marriage, children, work, etc.) with offenders, or engaging in romantic or sexual relationships with offenders.

The evidence establishes that Grievant wrote a love letter to Offender on or about September 2, 2015, and provided it to him on September 3, 2015. The content of this letter references Grievant having a dream about Offender and Grievant being in a hotel room together. The two of them were having fun, “but for some reason [Offender] could not cum.” Grievant continues in the letter by saying that she missed seeing Offender’s smile. Further, the letter indicates that the two were contemplating marriage. The letter ends with Grievant stating that she loved Offender.

Grievant has denied being the writer of the letter found on Offender’s person. To support her position, Grievant makes several arguments. Grievant contends, in effect, that another offender was jealous and presumably wrote the letter to get her in trouble. Also, she asserts that her room or desk drawers could not be secured. And someone stole her purple pen which could explain why the letter found on Offender was written in a similar color that she normally uses when writing. Further, she suggests that Offender was being investigated for assisting in bringing contraband into the prison at the time the love letter surfaced. Such an infraction carries more severe consequences for an offender, then having a relationship with an employee. Thus, Grievant argues, Offender may have caused the letter to be written in an attempt to deflect attention from his being investigated for contraband. Moreover, Grievant suggests that she has been terminated because she and the then Warden had words and termination was a way for Warden to retaliate against her.

After careful consideration of the evidence, the Hearing Officer finds that none of the above noted arguments have been substantiated.

Hearing Officer does find, however, that the Agency has met its burden and shown that the letter located on Offender’s person was authored by Grievant. For one, the Hearing Officer reviewed hand writings that are indisputably Grievant’s writings. They included, among others, Grievant’s Lockdown Log, notes on index cards, and notes on the materials from the Muslim seminar. The Hearing Officer then compared these writings to the letter found on Offender. The Hearing Officer has determined the writings are of such similarity that they support the Agency’s position. In addition, Grievant was known to write in purple ink. Even though one purple writing pen of hers may have been stolen, she had another one to use. The evidence demonstrates that this latter purple pen was used by Grievant to write notes during the September 2, 2015 Muslim seminar. Furthermore, the letter located on Offender was written in the same type purple ink. Also, of significance, the letter found on Offender, begins by stating that the Muslim seminar was boring. As previously noted, Grievant had attended that seminar the day before.

What is more, the evidence shows that the letter found on Offender and Grievant’s

known hand writings were analyzed by a hand writing expert at the Commonwealth's Department of Forensic Science. The expert determined that the letter was prepared by Grievant. In addition, the evidence demonstrates that Grievant's immediate supervisor attended the administrative due process hearing with Grievant. In fact, he was there in support of Grievant. Yet after reviewing the writing in question, the supervisor came to the conclusion, that Grievant should be disciplined, albeit in a less severe manner.

Clearly, the evidence in its totality shows fraternization.⁸ Hence, the Hearing Officer finds Grievant engaged in an unprofessional relationship with Offender that was prohibited by Agency policies 135.1 and 130.1. She has based her finding on the evidence showing that Grievant wrote the love letter found on Offender's presence.

Of recognition, the Hearing Officer is also cognizant that the evidence established that Offender is a convicted felon. That said, the Hearing Officer finds Offender's reported statement credible regarding (i) being in a relationship with Grievant for two weeks; (ii) exchanging letters with Grievant; and (iii) working on having sex with Grievant. This finding has been made after the Hearing Officer has deliberated on the totality of the evidence.

B. Was the discipline consistent with policy and law?

The evidence shows that the applicable policies demonstrate that fraternization is a group III offense. Hence, the Hearing Officer finds the Agency's discipline is consistent with policy and law.

The Hearing Officer makes this finding in light of any assertion by Grievant that she has been denied due process. For example, Grievant contends that the expert's analysis of the handwriting was not completed until after Grievant was terminated. She also asserts that she was not given an opportunity to read the letter found on Offender until her attorney was preparing for the grievance hearing. Assuming for argument sake that the Agency denied Grievant due process, the Hearing Officer finds any such error by the Agency has been cured during this grievance hearing process.

II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁹ EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."¹⁰ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

⁸ The Hearing Officer has made this finding after also considering Grievant's testimony that she has a 16 year marriage and is happy with it.

⁹ Va. Code § 2.2-3005 and (C)(6)

¹⁰ *Rules for Conducting Grievance Hearings* VI(A)

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹¹

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.¹²

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated. Grievant provided evidence that she had been employed by the Agency for about 18 months and had no prior disciplinary history. In addition, Grievant's co-workers described her as a good teacher who respected her students. Her most recent evaluation rated Grievant as “exceeds contributor.”

The Hearing Officer finds that the Agency has legitimate and compelling business reasons to prohibit fraternization between employees and offenders. For example, such relationships could greatly compromise the institution's security and could foster showing favored treatment to offenders who are the subject of the fraternization or their friends who are also offenders within the Department.

Thus, having carefully considered all evidence of record, whether specifically mentioned or not, the Hearing Officer cannot find the Agency acted without reason.

DECISION

¹¹ *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

¹² *E.g., id.*

Accordingly, for the reasons provided here, the Agency's Group III Written Notice with termination 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 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, Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov. or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative 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.¹³

Entered this 9th day of April, 2016.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency
Grievant's Advocate/Grievant
EDR

¹³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.