

Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 03/12/14; Decision Issued: 04/15/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10275; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 04/30/14; DHRM Ruling issued 05/20/14; Outcome: AHO's decision affirmed.**

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

**DIVISION OF HEARINGS**

In the matter of: Case No. 10275

Hearing Officer Appointment: February 6, 2014

Hearing Date: March 12, 2014

Decision Issued: April 15, 2014

**PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge termination of her employment effective December 13, 2013, pursuant to a written notice, issued December 13, 2013 by Management of Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated January 7, 2014.

The parties participated in a first pre-hearing conference call scheduled by the hearing officer on February 20, 2014 at 2:00p.m. The Grievant confirmed she is seeking reinstatement, back-pay, restoration of all benefits, and attorneys' fees.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on February 20, 2014 (the "Scheduling Order"), which is incorporated herein by this reference. The Grievant's attorney informed the hearing officer that the Agency had not produced documentation requested for the grievance and the Grievant's attorney undertook to send to the hearing officer a request for an order for production of documents. The Grievant's attorney followed up with the request for documents on February 21, 2014.

The advocate for the Agency objected to the document request by the Grievant and at 3:00p.m. on February 28, 2014, the hearing officer held a second pre-hearing conference call to address the objections of the Agency. The hearing officer ordered the Agency to produce most of the documents requested by the Grievant and on March 5, 2014, issued an Order for Production of Documents pursuant to Section 8.2 of the Grievance Procedure Manual (the "Manual").

By March 5, 2014, the parties timely exchanged and delivered to the hearing officer pursuant to the Scheduling Order, their proposed exhibits and witnesses for the hearing. At the hearing on March 12, 2014, the Agency offered no reasonable justification for not producing to

the Grievant the numerous reports of Agency witnesses, which most of these witnesses brought to the hearing to reference during their testimony.

Accordingly, the hearing officer grants the motion of the Grievant's attorney in her letter of March 21, 2014, to strike the entire testimony of the Agency's 5 witnesses presented in the Agency's case in chief. The Grievant's attorney did not request that the hearing officer strike the testimony of the Agency's one rebuttal witness, the Agency's Human Resource Assistant (the "HR Representative"). Even if the Grievant's attorney had requested this action, the hearing officer would have denied the motion because the HR Representative had no responsive notes or documents at the time the hearing officer issued his Order for Production of Documents on March 5, 2014.

"...[A] party is not required to create and produce a document if the document does not exist. *Rules for Conducting Grievance Hearings* (effective July 1, 2012) (the "Rules").

The HR Representative credibly and convincingly testified that she destroyed her rough notes of the date, time and who was present at the due process meeting on December 10, 2013 and at the issuance of the Written Notice on December 13, 2013, after she typed all such information on to the Written Notice. This action obviously way preceded the filing of the grievance and the hearing officer's order for production of documents.

Similarly, the hearing officer sees no reason to grant the Grievant's attorney's request to exclude the entire Agency Exhibit 4. The hearing officer will obviously refer to the operative Operating Procedure Number 130.1, not an outdated version. As for the Grievant's signed "Verification of Receipt" of the "Reminder Memorandum from Director Johnson dated October 27, 2006, regarding Fraternization" and related Memorandum (AE 4, at 5-6), the Grievant obviously had this document in her possession at one time and, in any event had it in the Agency's exhibits by March 5, 2014, a week before the hearing.

Additionally, the hearing officer allowed the Grievant the opportunity to adjourn the hearing and reconvene at a later date once the Grievant and her attorney had had an opportunity to review the sought documents, but the Grievant elected to proceed with the hearing.

In addition to the background circumstances and authorities cited by the Grievant's attorney in her letter brief of March 21, 2014, the hearing officer has the authority to impose the above sanctions in an egregious case of non-production of responsive documents by the Agency ordered by the hearing officer, pursuant to the panoply of sanctions options afforded to the hearing officer under Section III (E) of the Rules.

At the hearing, the Grievant was represented by her attorney 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 hearing<sup>1</sup>. The hearing officer used his own recording equipment and tapes.

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

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. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

### APPEARANCES

Representative for Agency  
Grievant  
Witnesses

### FINDINGS OF FACT

1. The Grievant was formerly employed as a Food Operations Supervisor by the Agency at a correctional facility (the "Facility") which incarcerates approximately 488 offenders.
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 relating to contraband, romantic liaisons between staff and offenders, etc.
3. The Grievant was employed by the Agency as a Food Operations Supervisor and her duties included: "Supervises the activities of offenders in the preparation and serving of meals for the population and staff. Trains offenders in all kitchen policies and procedures. Maintains a high standard of food safety, sanitation and quality in a cost-efficient manner." AE 3.
4. The Grievant was hired by the Department on October 25, 2006.

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References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are designated GE followed by the exhibit number.

5. On October 29, 2013, the Grievant was supervising approximately 8 offenders on a food line who were serving breakfast to the general population of the Facility between approximately 6:00a.m. to 7:00a.m.
6. At approximately 7:00a.m. as the Grievant looked through the chuck hole, an offender grabbed the Grievant on the right buttock and squeezed, surprising the Grievant and causing the Grievant to yell out loudly, also causing the Grievant to knock the tools out of the hands of Offender O as the Grievant swung around, and causing the Grievant to become very upset.
7. While the Grievant did not know initially who committed this assault on her, she later learned that is was Offender M.
8. The Grievant acknowledges that it was important to report the incident because of the degree of the attack, because she was in a small confined area with other inmates and because of the elevated risk potential.
9. The Grievant admits that she "failed to report behaviors against [her] while working in the kitchen." AE 2.
10. The Grievant stated that she "had planned to report this incident..." AE 2.
11. At the hearing, the Grievant at first took the position that she reported the assault to her immediate supervisor.
12. However, her supervisor when called by the Grievant as a witness for the Grievant, testified that on the day of the incident he was away from the facility at the Academy for new supervisor training.
13. The supervisor testified that he would not be the appropriate person for the Grievant to report the incident to because he was away but that the Grievant should have gone up the chain of command to report this incident.
14. Furthermore, the supervisor testified that he asked the Grievant when she informed him about the assault between 2:00 - 2:30 p.m. whether the Grievant had reported it and she replied "yes".
15. The Grievant did not report the assault. At least 20 minutes after the assault occurred, Corrections Officer M ("C/O M") was in the bathroom when he overheard a conversation between the Grievant and a different Offender KM regarding the Grievant being touched inappropriately.
16. C/O M asked the Grievant if she had reported the assault and the Grievant responded that she had not "because [she] did not know who did it." GE 6.

17. During a pre-disciplinary due process meeting on December 10, 2013, the Grievant admitted that Offender M had touched the Grievant inappropriately more than once, and that the Grievant had not reported it.
18. During the hearing, the Grievant testified that in January 2013, in the main part of the kitchen, Offender M had "pinc4ed [her] behind" and that she had slapped Offender M's hand away. The Grievant admitted during the hearing that she did not report this incident.
19. In describing the incident on October 29,2013, during the hearing, the Grievant's testimony also included a characterization that "somebody had pinched [her] behind."
20. On December 13, 2013, the Grievant met with the Facility's Chief of Security, the HR Representative and the Warden, and the Grievant acknowledged that she had made a mistake by not reporting the occurrences of being touched. GE 6.

#### 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, 231 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 6. 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 Policy No. 135.1, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy No. 135.1 provides in part:

**V (D). THIRD GROUP OFFENSES (GROUP III):**

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

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

(y) Violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*

(ee). 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 Operations Chief on a case by case basis (*see* Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*).

AE6.

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

**Fraternization** - 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.

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

IV (B). 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.

2. Vigilance - Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of departmental operating procedures. Observed incidents or suspicions of planned incidents shall be reported to the employee's supervisor or the appropriate officer in accordance with established procedures.

5. Interactions- While performing their job duties, employees are encouraged to interact with persons under DOC supervision on an individual and professional level maintaining appropriate boundaries to promote and accomplish DOC goals.

IV (C). Improprieties: Non-Professional Association

1. Fraternalization-

a. Except for preexisting relationships (see below), fraternization or non-professional relationships between



employees and offenders are prohibited, including when the offender is within 180 days of the date following discharge from DOC custody or termination from supervision, whichever occurs last.

1. This action may be treated as a Group III offense under Operating Procedure 135.1, *Standards of Conduct*.

2. Improprieties -

Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out employee's responsibilities may be treated as a Group III offense under Operating Procedures 135.1 *Standards of Conduct*.

D. Offender Abuse Prevention

3. Physical contact with offenders shall be conducted in a professional manner using the minimum amount of force necessary to provide appropriate apprehension, intervention, and control as needed to protect the offender, staff and the general public, and to maintain a safe and secure environment.

E. Employee and Supervisory Reporting Responsibilities

1. Employee Responsibilities - In addition to complying with the above procedures, employees have a continuing affirmative duty to disclose to their supervisors or other management officials any conduct that violates this procedure or behavior that is inappropriate or compromises safety of staff, offenders, or the community and any staff or offender boundary violations. (4-APPFS-3E-05)
2. Supervisory Responsibilities - Supervisors shall ensure that all reports of violation of this operating procedure are forwarded to management at the work unit for investigation.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning fraternization constituted a Group III Offense. The Grievant was clearly required by policy to report the sexual assaults of Inmate M on her. The Grievant admitted her failures and her *ex post facto* rationalization that Inmate M's "pinching of her bottom" in January 2013 could have been handled by her cautioning the inmate alone is unconvincing, belied by the policy and not supported by the brochure language on which she

relies. All that the brochure provides is that the supervisor is to "[t]ake appropriate action on all boundary violations (correcting, counseling or discipline as appropriate) (emphasis supplied)."

As the Grievant's prior admissions reveal, clearly policy required that the nature of Offender M's offenses be reported by Grievant up the chain of command. The October 27, 2006 policy reminder to the Grievant clearly spelled out that "...staff should not have physical contact with offenders except in order to maintain a safe and secure environment..." AE 4.

EDR has consistently held management to a higher standard. As EDR stated in case No. 9872, in evaluating misconduct by a supervisor that to a non-supervisory employee would have been a Group I, the discipline was increased to a Group II, stating, "This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision." Under Operating Procedure 130.1, by policy, the Grievant was required "by acting in accordance with this operating procedure to provide a positive role model for offenders." AE 4 at IV (A)(I).

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.

The Grievant has specifically raised mitigation in the hearing and 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:

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 long, exemplary service to the Agency since October 25, 2006;
2. the fact that the Grievant received an overall rating of "Exceeds Contributor" in her most recent performance evaluation (GE 2);
3. the facts that the Grievant received an overall rating "Contributor" in her performance evaluations in October 2012 and November 2011 (GE 3 and 4);
4. the often difficult and stressful circumstances of the Grievant's work environment;
5. the document production failures of the Agency; and
6. the lack of prior discipline

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. 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 action of the Agency in issuing the written notice and in terminating the Grievant's employment and 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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. 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 refer 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 or e-mailed.
2. A challenge that the hearing decision does not comply with grievance procedure as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

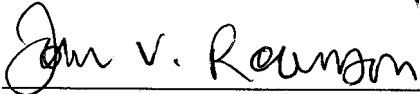
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of 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 EDR before filing a notice of appeal.

ENTER: 4 / 15 / 14

A handwritten signature in black ink that reads "Johil V. Robinson". The signature is written in a cursive style with a horizontal line underneath the name.

Johil 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).