Issue: Group III Written Notice with demotion and pay reduction (failure to follow policy that could have resulted in weakening of security); Hearing Date: 06/20/14; Decision Issued: 06/25/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10350; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10350

Hearing Officer Appointment: May 1, 2014
Hearing Date: June 20, 2014
Decision Issued: June 25, 2014

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 January 13, 2014 by the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated February 3, 2014.

The Grievant is seeking the relief requested in his Grievance Form A including restoration of any lost pay and benefits and rescission and removal from his record of the Group III Written Notice.

The Grievant, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on May 6, 2014.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order and an Amended Scheduling Order entered on May 8, 2014, 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 hearing[1].

[1] References to the agency's exhibits will be designated AE followed by the exhibit number (the hearing officer did not admit into evidence AE 7). Any references to the Grievant's single exhibit will be designated GE followed by the exhibit number, 1.

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. In an effort to claim child support, a former female Correctional Officer (the "C/O") at a large prison facility of the Agency (the "Facility") reported a sexual affair with the Grievant, a lieutenant and security officer in the housing unit of the Facility.

2. The Grievant admitted to the Warden in charge of Housing and Adult Development at the Facility (the "Warden") that he had consensual sex off and on with the C/O for a period of 2 1/2 years (the "Period").

3. During this period, for a period of 1 - 1 1/2 years, the Grievant was a direct supervisor of the C/O.

4. The Grievant has received significant training concerning the applicable Agency policies. *See*, e.g., AE 8 and 9.

5. The Grievant did not report the sexual relations with the C/O to management of the Facility or his unit head.

6. The Grievant has an active Group I Written Notice for failure to follow policy. AE 6.

7. On January 13, 2014, the Warden issued to the Grievant a Written Notice for:

> Violation of DOC Operating Procedure 101.3. Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/ Sexual Harassment in the Workplace. On December 17, 2013, you admitted you did not report involvement with [C/O] at [the Facility] even though you were aware of the reporting policy. For this reason, you are being issued with this written notice.

AE 1.

8. The Grievant admits that the matter should not have happened.

9. The testimony of the Agency witness was credible. The demeanor of such witness 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 11. 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.

Agency Operating Procedure No. 101.3 provides in part in Section IV (F) that:

> Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the *Standards of Conduct* and will be treated as a Group 1, Group II, or Group III offense depending on its effect on the work environment.
>
> A subordinate includes anyone in a supervisor's direct chain of command...
>
> All employees are responsible for compliance with this operating procedure regarding consensual personal relationships in the workplace. The Organization Unit Head will determine the appropriate disciplinary action to be taken and the reassignment or transfer of the supervisor or employee to alleviate the supervisor/ subordinate work problems the relationship may create...
>
> Regardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential employment issued.

AE 9.

The Facility incarcerates approximately 2,600 inmates. Security and safety at the Facility of staff, offenders and the public are paramount. Accordingly, even consensual personal relationships between staff which are not reported to unit heads, as required by policy, can jeopardize security because inmates could seek to gain leverage over staff in such circumstances and failure to follow policy can erode respect for staff in such circumstances.

Section VI (F) provides additional reasons behind the policy:

> Dating or intimate relationships between supervisors and subordinates undermines the respect for supervisors with the other staff, undermines the supervisor's ability to make objective decisions, may result in favoritism or perceived favoritism, may lower morale among co-workers, or open supervisors to future charges of harassment or retalitation claims. Additionally, supervisory/subordinate relationships may bring about complaints from co-workers and create a liability for the DOC.

AE 9.

The Grievant argued in his Form A and at the hearing that "should" in Section VI (F)(2)(e) ought to be interpreted as directory. However, the hearing officer decides that "should" in this context is mandatory. (*See.*, e.g., dictionary.com). This interpretation is further supported by the Minutes of the Security Supervisors' Meeting on November 30, 2011, signed by the Grievant. AE 8A.

Additionally, EDR has consistently held supervisors 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."

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:
>
> . . . .
>
> (p) Refusal to obey instructions that could result in a weakening of security.

AE 11.

Furthermore, Section IV (E) of the SOC provides:

> The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours, that in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

AE 11.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning consensual relationships with employees/subordinates 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 could have supported 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 Group III 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 and instead of terminating the Grievant's employment, chose to demote the Grievant to C/O with a 10% pay reduction. AE 1.

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A. 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 exemplary service to the Agency of over 10 years;

2. the Grievant's honesty in his interview with the Warden;

3. the often difficult and stressful circumstances of the Grievant's work environment; and

4. the Grievant's service to the country as a member of the U.S. Army.

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 Grievant argued that the Agency did not provide progressive discipline and the discipline was too harsh. However, the Grievant has an active Group I Written Notice and he and another female employee admitted in the past to a consensual sexual relationship, which was not reported. The Agency, for institutional purposes and reasons, chose not to pursue this matter at that time. Accordingly, the hearing officer decides that the Agency did pursue progressive discipline within its prerogative and the punishment was by no means too harsh.

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 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: 6 / 25 / 14

John V. Robinson

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).

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