Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 06/24/14; Decision Issued: 06/25/14; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10371; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10371

Hearing Date: June 24, 2014
Decision Issued: June 25, 2014

PROCEDURAL HISTORY

Grievant was a corrections officer for the Department of Corrections ("the Agency"), with fifteen years of service with the Agency as of the offense date. On April 22, 2014, the Grievant was charged with a Group III Written Notice, with job termination, for violation of the Agency's fraternization policy. The Grievant had no prior, active disciplinary notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On May 21, 2014, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, June 24, 2014, on which date the grievance hearing was held at the Agency's facility.

The Agency submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's Exhibits, accordingly.

APPEARANCES

Grievant
Representative/witness for Agency
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through her grievance filings, the Grievant requests rescission or reduction of the Group III Written Notice and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW 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 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).

Code § 2.2-3000 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.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group III offenses to include acts of misconduct of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 7. An example of a Group III offense is any violation of Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*, and fraternization or non-professional relationships with offenders. Agency Exh. 8.

Operating Procedure 130.1 provides a definition of 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.

The policy provides that fraternization may be treated as a Group III offense under Operating Procedure 135.1, *Standards of Conduct*. The policy provides that associations between staff and offenders may compromise security, or undermine the effectiveness to carry out the employee's responsibilities, and they may be treated as a Group III offense. Similarly, the policy provides that employees shall not extend or promise to an offender special privileges or favors not available to all persons similarly supervised.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a corrections officer, with fifteen years tenure, and she had no prior active Written Notices. The Written Notice charged:

> On April 1, 2014, while working on evening shift you were observed by rapid eye video to open control room door with 300 pod door open with offender in doorway. The same evening you were observed with the same offender from 300 pod in the secretary's office without the light on standing at the door / going into the office on three occasions for over 10 minutes. Special Investigation Unit completed their investigation and determined it was a founded case of an employee in unauthorized relationship with an offender.

The Agency's witnesses, the warden and facility investigator, testified consistently with the charge in the Written Notice. They testified that the Grievant denied the conduct during the investigation and grievance process. The conduct charged—specifically the extended time with the offender in the secretary's office with the light off—was shown by Rapid Eye video. Agency Exh. 6. The Agency stipulated that the matter of leaving open the control room door was not considered the termination offense.

The warden testified that all fraternization offenses he has handled resulted in a Group III Written Notice with termination.

At the Agency's request, the hearing officer issued witness orders. One of the witnesses, a corrections officer from whom a written statement was obtained during the investigation, failed to appear at the grievance hearing. A second witness, another corrections officer who signed a

written statement, testified via telephone but ultimately refused to answer the hearing officer's questions and terminated the call. Before terminating the call, the witness stated that her statement was "out of context" and she felt under duress when she signed it. She testified, however, that she observed conduct similar to that charged in the Written Notice. Both witness statements referred to the officers' observations of the Grievant spending an unusual amount of time with the offender.

During the investigation, the Grievant denied the exact conduct that was shown to have occurred on the Rapid Eye video. In her signed written statement for the investigation, the Grievant made the following statements:

> I have never been in a room with [the offender], nor have I ever been in the secretary's office, with the lights out and [the offender] talking to me while standing at the door. I have never just talked with [the offender] for the sake of talking. If anyone ever said I had talked with him for over 2 minutes, they would be lying.

This denied conduct was shown by the Rapid Eye video. At the grievance hearing, the Grievant did not deny the activity shown by the Rapid Eye video, and she did not articulate a reason for her extended interaction in a dark room with the inmate in question. The Grievant did not challenge the Agency's assertion that she was appropriately trained on the policies prohibiting the conduct charged, but she asserted there was a time limit (perhaps three minutes) of conversation with offenders that is allowed without being considered fraternization. She offered no specific proof of such a time limit or any indication that the time limit would extend as long as the ten minutes of her interaction with the inmate shown on the video. The Grievant testified that other staff members have acted inappropriately but were not disciplined.

Circumstantial evidence is competent to prove material facts. *Hoar v. Great E. Resort Mgmt.*, 256 Va. 374, 388, 506 S.E.2d 777, 786 (1998). Based on the evidence presented, I find by preponderance of the evidence that the excessive time the Grievant spent with the offender established that the Grievant, at a minimum, compromised her security and, necessarily, that of the Agency. The Grievant's interaction with and attention to the offender provided a privilege to the offender that undermined the effectiveness of the Grievant and the staff, generally. This establishes a prohibited relationship with the offender. Based on the evidence and Grievant's testimony, I find the Agency has proved the offense and level: Group III Written Notice. The analysis moves to mitigation.

Mitigation

The Group III Written Notice with termination is necessarily a harsh consequence. Pursuant to applicable policy, management has 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, *even if he would levy lesser discipline*, 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*. A hearing officer does not have the same discretion for applying mitigation as management does.

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 Human Resource Management …." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management." 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, and (3) the disciplinary action was free of improper motive. The Grievant produced no such mitigating evidence. The Grievant asserted that her termination was disparate treatment, but there was insufficient evidence presented to support the assertion.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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).

The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant and all security personnel must interact with a challenging population of inmates, and it is incumbent, for obvious security reasons, for staff conduct to adhere to strict expectations. The Grievant's conduct put herself and the Agency at risk, and, while strict in its application, warrants disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and offenders in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of corrections officers. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action regarding the Group III Written Notice as outside the bounds of reasonableness.

DECISION

For the reasons stated herein, the Agency's issuance of the 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
   Department of Human Resource Management
   101 North 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 North 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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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