Issue: Administrative Review of Hearing Officer's Decision in Case No. 10802; Ruling Date: August 4, 2016; Ruling No. 2016-4384; Agency: Department of Corrections; Outcome: Remanded for Clarification.

*COMMONWEALTH of VIRGINIA*
***Department of Human Resource Management***
*Office of Employment Dispute Resolution*

## ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2016-4384
August 4, 2016

The Department of Corrections ("agency") has requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10802. For the reasons set forth below, EDR remands the case to the hearing officer for reconsideration and clarification.

### FACTS

The relevant facts as set forth in Case Number 10802 are as follows:[1]

> The Agency employed the Grievant as a corrections lieutenant when it learned that he was engaged in a personal romantic or sexual relationship with an officer trainee, SG. SG initiated the relationship with the Grievant, and they began their relationship in the fall of 2015. The Written Notice provided:
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> > Violation of DOC Operating Procedure (DOP) 101.3, Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/Sexual Harassment in the Workplace: The facility was notified that you were in a consensual, personal relationship with an Officer in your indirect line of supervision whom you occasionally had direct supervisory responsibilities for at the facility. According to the trainee, you had several sexual encounters with her. Relationships between supervisors and subordinates are prohibited under DOC Operating Procedure (DOP) 101.3. In addition to engaging in a relationship with subordinate, you admitted you had been in the relationship with the trainee since December 2015 and had not notified the facility of the relationship in accordance with procedure.

[1] Decision of Hearing Officer, Case No. 10802 ("Hearing Decision"), June 13, 2016, at 4-5. (Some references to exhibits from the Hearing Decision have been omitted here).

The Grievant admitted to the relationship and that he failed to provide notification to Agency management. He said he and officer SG did not report the relationship because they were both married. The Grievant asserts that the Agency's level of discipline is disproportionate to the offense and that the Agency applies discipline under this policy inconsistently. The Grievant testified that it was only after he filed his grievance, asserting disparate enforcement of the policy, that the trainee officer's, SG, probationary period was extended. SG also testified to confirm the relationship and that her probationary status was extended only after the Grievant made his grievance. The Grievant also pointed to at least two other instances of relationships between supervisors and subordinates that have not resulted in discipline. The Grievant also testified that he did not directly supervise SG, that she was a trainee in his building for one or two weeks, and that he never gave her any orders or assignments nor showed any favoritism.

As circumstances considered, the Written Notice provided:

> According to DOP 101.3, sexual relationships with subordinates are prohibited and may subject to disciplinary action up to a Group III written notice. Furthermore, the appropriate disciplinary action for the multiple violations of policy is usually a Group III with termination. The disciplinary action has been mitigated from termination to a demotion. No additional mitigation is appropriate.

The warden testified that if the Grievant had provided notice of the relationship, there would have been no discipline issued to the Grievant. He further testified that the Agency's interpretation of the policy is that the prohibited relationships are allowed when notification is provided. Notwithstanding the existence of the supervisor/subordinate relationships, the warden explained that no discipline was issued in the two other cases the Grievant pointed to because notification of the relationship was provided. The warden testified that when management knows of the relationship, the Agency can take measures to minimize and manage the conflicts or potential conflicts.

The warden testified that, based on "chatter" of a relationship involving the Grievant, he warned the Grievant not to be engaged in an unauthorized relationship. The warden also testified that he took this disciplinary action once the relationship was reported to the facility by a third-party, anonymous caller, and confirmed through investigation. The warden testified that there was no specific adverse effect on the work environment beyond the stated concerns within the policy itself—that intimate romantic 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 and the Agency to liability risk. The warden testified that this discipline was imposed before any harm to the Agency occurred. The warden

also testified that the Grievant, as a supervising lieutenant and "dialogue practitioner," set a poor example with this relationship.

On or about February 8, 2016, the grievant was issued a Group III Written Notice, with demotion to a role title of Corrections Officer and 10% reduction in salary, at a new facility.[2] The grievant timely grieved the disciplinary action and a hearing was held on June 10, 2016.[3] On June 13, 2016, the hearing officer issued a decision reducing the disciplinary action from a Group III Written Notice to a Group I Written Notice and ordering the grievant reinstated to his previous position.[4] The agency has now requested administrative review of the hearing officer's decision.

## DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . ."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

### *Inconsistency with State and Agency Policy*

The agency asserts that the hearing officer's decision is inconsistent with policy, contending that the hearing officer's interpretation of testimony at the hearing regarding the application of policy prohibiting relationships between supervisors and subordinates is flawed. Further, the agency argues that the hearing officer's mitigation of the discipline to a Group I offense is contrary to DHRM Policy 1.60, *Standards of Conduct*. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The grievant has requested a review by DHRM. Accordingly, the grievant's policy claims will not be discussed in this ruling, except to the extent the issues are related to the grievance procedure and addressed below.

### *Characterization of Disciplinary Action*

The agency argues that, in reducing the Group III Written Notice imposed by the agency to a Group I Written Notice, the hearing officer's decision was inconsistent with the grievance procedure. In assessing whether a grieved disciplinary action was warranted and appropriate under the facts and circumstances, a hearing officer is required to assess whether the action was consistent with the *Standards of Conduct*.[8] In making this determination, the hearing officer

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[2] Agency Exhibit 1.
[3] Hearing Decision at 1.
[4] *Id.* at 1, 7.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] *See Rules for Conducting Grievance Hearings* § VI(B)(1).

should consider an agency's stated grounds for selecting the level of disciplinary action taken. In this case, the hearing officer found that, though the potential for a severe impact due to the grievant's misconduct existed, the agency "did not show any evidence of adverse effects on the work environment. There was no evidence of any resulting untoward conduct or circumstance at work or that personnel assignments would have been any different had the relationship been reported."[9] The hearing officer thus reduced the disciplinary action from a Group III Written Notice to a Group I Written Notice, finding that "discipline more severe than a Group I Written Notice is not supported."[10]

However, the agency points out that the hearing officer found that the grievant did fail to follow agency policy insofar as that policy required the grievant to report his relationship with the trainee officer, and such misconduct is properly classified as a Group II offense. Attachment A to DHRM Policy 1.60, *Standards of Conduct*, lists the failure to "comply with written policy" as an example of a Group II offense.[11] Here, EDR finds that the hearing decision lacks supporting detail setting forth the hearing officer's rationale for finding that the misconduct in this instance constitutes a Group I offense rather than a Group II offense. Accordingly, EDR directs the hearing officer to provide further explanation of his factual findings with respect to the proper level of offense for the grievant's misconduct.[12]

*Mitigation*

The agency also argues that the hearing officer failed to give the appropriate level of deference to the decisions of agency management and essentially acted as a "super-personnel officer" in reducing the disciplinary action. By 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 rules established by [EDR]."[13] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "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."[14] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (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

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[9] Hearing Decision at 6.
[10] *Id*.
[11] DHRM Policy 1.60, *Standards of Conduct*, at Attachment A.
[12] Indeed, Operating Procedure 135.3(IV)(F)(2)(e) provides that "[r]egardless 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 issues" (emphasis added). The hearing officer should consider and address this language as well as any other record testimony on the requirement to report the conduct under policy.
[13] Va. Code § 2.2-3005(C)(6).
[14] *Rules for Conducting Grievance Hearings* § VI(A).

> mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[15]

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.

In this case, the hearing officer concluded that the agency "has not consistently applied disciplinary action among similarly situated employees,"[16] however, he declined to further mitigate due to his analysis of the proper level of discipline as outlined above. Essentially, the hearing officer did not reach the issue of mitigation in this instance because he determined that the offense could rise to no more than a Group I Written Notice. Because this matter is being remanded in order to allow the hearing officer to reconsider and clarify his decision as to the appropriate level of offense, the hearing officer should also re-apply the appropriate mitigation standard set forth in the *Rules* following his reconsideration.

## CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[17] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[18] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[19]

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[15] *Id.* § VI(B).
[16] Hearing Decision at 7.
[17] *Grievance Procedure Manual* § 7.2(d).
[18] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[19] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).