Issue: Administrative Review of Hearing Officer's Decision in Case No. 8636; Ruling Date: September 5, 2007; Ruling #2008-1749, 2008-1759; Agency: Department of Corrections; Outcome: Hearing Decision Not in Compliance – Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2008-1749, 2008-1759
September 5, 2007

Both the grievant and the Department of Corrections (DOC or the agency) have requested that this Department administratively review the hearing officer's decision in Case Number 8636. For the reasons set forth below, the grievance is remanded to the hearing officer for further proceedings in accordance with this ruling.

FACTS

This case involves allegations of fraternization with a parolee for which the grievant received a Group III Written Notice with removal.[1] The hearing officer found the facts as follows:

> *The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities for approximately eight years until her removal effective January 8, 2007. No evidence of prior disciplinary action against Grievant was introduced during the hearing. The Grievant testified there were no prior Group Notices.*
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> *In the fall of 2006, Grievant began a personal relationship with TM, a parolee. Although the parolee was incarcerated at the same facility where the Grievant worked, the Grievant maintained she was unaware of TM's parolee status. The Grievant worked at the facility in a floater capacity, and may have come in contact with TM from time to time. After starting her friendship with TM, the Grievant heard some non-specific information that TM had been "locked up." The Grievant terminated her friendship with TM after a few dates. The Agency received an anonymous tip of the relationship and began an investigation. As part of the investigation, Grievant admitted she had a brief relationship with TM. The Grievant denied knowing TM was a parolee at the time of the relationship. The Grievant testified that TM's past and record was never discussed during their*

[1] Decision of Hearing Officer, Case No. 8636, July 18, 2007 ("Hearing Decision"), at 1.

personal time together. The Grievant testified that they only discussed politics and food. The Grievant did not testify or suggest that TM misrepresented to her or concealed his status as a parolee.

The Grievant testified that she had already elected to terminate her relationship or friendship with TM when she learned from an unidentified person that TM may have been "locked up." The Grievant changed her telephone numbers to dissuade any further contact from TM, but she did not take any steps to determine specifically whether TM was a parolee. The unsworn written statement from the parolee indicated that he knew the Grievant from professional contact while actually incarcerated. A convicted felon's credibility is suspect, and his unsworn statement carries less weight than the testimony of a sworn witness. However, the parolee's statement also revealed his knowledge of the special investigator's interview of the Grievant, and that the Grievant telephoned him to discuss the internal investigation. According to the special internal investigator, the parolee knew of the interview of the Grievant independently, and the parolee stated the Grievant telephoned him with that information and detailed the interview conversation. Thus, the credibility of the Grievant is also suspect.

The Agency's other witness, the warden senior, testified that the policy against fraternization is grounded in the security of the Agency's mission of integrity and trust. The warden testified that the policy makes it incumbent on all employees to report any such non-professional relationship to supervision when it becomes known to the offender. Fraternization can be a major problem in correctional facilities. When an inmate establishes a personal relationship with an employee, either the inmate or the employee can use that relationship for harm—even unwittingly. At another level, the inmate may become a victim from such a relationship. It does not matter whether the relationship involves physical intimacy. For this reason, the agency has taken a very firm stand on disciplining fraternization infractions.

The warden also testified that mitigating factors were not considered because of the Agency's stance on fraternization infractions. The warden characterized the Agency's response as a zero tolerance of fraternization offenses.[2]

Thereafter, the hearing officer made the following findings:

After considering the evidence presented and the credibility of the witnesses, I find that the Grievant violated Operating Procedure 130.1, by her act of, or giving the appearance of, association with the offender identified for a personal, non-professional relationship. I do not find credible her testimony that she was completely unaware of the parolee's status when she was engaged in the

[2] *Id.* at 3-4.

> *relationship. I find that a Corrections employee has the inherent obligation to determine the propriety of personal relationships, given the public trust and stated policy concerning professional and personal relationships of Corrections employees. I find that a Corrections employee has an inherent duty, grounded in Operating Procedure 130.1, to make a reasonable inquiry before engaging in personal relationships with unfamiliar individuals. Assuming the Grievant was actually and completely unaware of TM's status, there is no evidence that the Grievant made even the most minimal inquiry to honor the applicable policy against fraternization and protect the public trust inherent in her position. Thus, I find the Grievant violated the policy against fraternization as charged in the Written Notice.*[3]

The hearing officer also found that that agency failed to consider mitigating circumstances in its disciplinary action.[4] Therefore, the hearing officer vacated the level of discipline and remanded the action back to the agency to consider mitigating factors.[5] The hearing officer made no independent assessment of any mitigating factors. Both the grievant and the agency have submitted requests for administrative review of the hearing officer's decision.[6]

DISCUSSION

By statute, this Department 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."[7] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[8]

Fraternization

The grievant has challenged the hearing officer's findings that the grievant violated the DOC policy against fraternization on the grounds that 1) the agency presented no evidence that the grievant knew that TM was an offender during their association; 2) the agency disciplined the grievant for failing to report her conduct, not for engaging in an inappropriate relationship; and 3) DOC Operating Procedure 130.1[9] does not provide for a self-reporting requirement. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[10] and to determine the grievance based "on the material issues and grounds in the record for those

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[3] *Id.* at 4.
[4] *Id.* at 5-6.
[5] *Id.* at 6.
[6] The hearing officer also issued a reconsideration decision on August 2, 2007, which affirmed the original decision.
[7] Va. Code § 2.2-1001(2), (3), and (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders* ("DOC Policy 130.1").
[10] Va. Code § 2.2-3005.1(C)(ii).

findings."[11] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

At hearing, the Warden Senior testified, in effect, that the disciplinary action against the grievant would not have been issued if the grievant had reported her conduct to her supervisor upon determining that TM may have been an offender.[12] This position was also stated by another agency witness.[13] At hearing, both agency witnesses stated, "we wouldn't be here" if the grievant had reported the conduct.[14] Taken to its natural conclusion, this evidence appears to indicate that if the grievant had reported her conduct, she would not have been disciplined. However, the hearing officer upheld the disciplinary action on the basis that the grievant violated the policy "by her act of, or giving the appearance of, association with the offender identified for a personal, non-professional relationship" and even though she might not have known that TM was an offender, she should have inquired into his status.[15] Thus, the hearing officer upheld the discipline on the basis of a relationship that the agency appears to dismiss as not problematic so long as it was reported.

The hearing officer's holding appears to conflict with the apparent position of the agency's witnesses, i.e., that if an employee does not know that a particular person is an offender, the employee has not violated the policy against fraternization. The hearing officer did not discuss the discrepancies between finding that the grievant had engaged in fraternization and the fact that 1) the agency appears to have disciplined the grievant for failing to report her conduct, not engaging in the inappropriate relationship, and 2) the agency does not appear to hold the grievant responsible for not knowing that TM was an offender. Hearing decisions "must contain findings of fact on the material issues and the grounds in the record for those findings."[16] The hearing officer did not include discussion about these material issues raised by the testimonies of the agency's witnesses. Moreover, the hearing officer must address the basis of his finding that disregards the agency's stated reasons for the disciplinary action. Indeed, in light of these considerations, the hearing officer must clarify the basis of his decision that the grievant violated DOC Policy 130.1, as there are questions as to whether the evidence in the record supports the hearing officer's findings.

The hearing officer must re-examine these issues because the Warden Senior's testimony has numerous effects on the ultimate holding in this case. First, the hearing officer needs to clarify the grounds for his interpretation of DOC Policy 130.1, which he apparently concludes

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[11] *Grievance Procedure Manual* § 5.9.
[12] Hearing Tape 1, Side B, at Counter Nos. 460-516; *see also* Hearing Tape 1, Side B, at Counter Nos. 390-400, 425-35.
[13] Hearing Tape 1, Side B, at Counter Nos. 25-30.
[14] Hearing Tape 1, Side B, at Counter Nos. 25-30, 460-70. The hearing officer also noted in his decision that the "warden testified that the policy makes it incumbent on all employees to report any such non-professional relationship to supervision *when it becomes known to the offender*." Hearing Decision at 4 (emphasis added).
[15] Hearing Decision at 4.
[16] *Grievance Procedure Manual* § 5.9.

does not require that an employee know that a person is an offender before being in violation of the policy.[17] This distinction is especially important given that the record evidence seems to point to a different interpretation of the policy by the agency. Moreover, it appears that no credible evidence was presented at the hearing that the grievant knew TM was an offender.[18] Although the hearing officer discounted the grievant's testimony that she did not know TM was an offender, there does not appear to be evidence presented to establish that she did know. The agency has the burden to prove this knowledge, if it is a requirement of the policy, in a disciplinary case. Consequently, if the agency's position is that DOC Policy 130.1 requires that an employee know that a person is an offender to violate the policy, then there would appear to be insufficient evidence in the record to support discipline for fraternization under that standard in this case.

Through its witnesses' testimony, the agency appears to assert that the grievant was disciplined because she did not report her conduct. Should the hearing officer find that disciplining the grievant for her failure to report was warranted and appropriate, further considerations must be addressed. The Written Notice at issue is a Group III because, under DOC Policy 130.1, fraternization "may" result in such a Group III.[19] However, if the hearing officer finds that the grievant was disciplined for failure to report her conduct, the grounds for issuing the Group III under DOC Policy 130.1 are no longer effective. That policy provides that fraternization or "improprieties," not a failure to report, are acts that may be treated as Group III offenses.[20] As such, the hearing officer should consider whether a Group III exceeds the limits of reasonableness, and whether a lesser level of discipline may be appropriate. What level would be warranted might largely depend on the question of whether the duty to report appears in DOC Policy 130.1 or any policy at all.

Mitigation

The agency contends that the hearing officer erred in determining that the agency is obligated to consider mitigating circumstances under the Standards of Conduct and, subsequently, remanding the disciplinary matter to the agency for such consideration. The question of whether the Standards of Conduct require an agency to consider mitigating circumstances is a matter of policy and, as such, is an issue to be addressed by the Department of Human Resource Management (DHRM). However, it is not clear from the record evidence that the agency has refused to consider all mitigating circumstances in this case. On the Written Notice itself, under "Circumstances Considered," the agency notes that it took the grievant's

[17] The hearing officer appears to find that the grievant, as a DOC employee, has a duty to inquire into the status of unfamiliar individuals with whom she might have a relationship. Hearing Decision at 4. Whether such a duty is properly implied from the plain language of DOC Policy 130.1 is not a question for this Department. However, holding the grievant to this duty might also be inconsistent with the testimony of the agency's witnesses that appear ***not*** to hold the grievant responsible for having no knowledge that TM was an offender.

[18] The unsworn written statement from the offender indicates that he knew the grievant while he was in prison. Hearing Decision at 4. However, the hearing officer found the offender's credibility suspect. *Id.* Indeed, the testimony from agency witnesses would also seem to indicate that the agency did not think the grievant knew TM was an offender.

[19] DOC Policy 130.1 § V.

[20] *Id.*

length of service into account. Therefore, the question posed to DHRM might not just be whether an agency has the duty to consider mitigating factors, but how an agency might satisfy that duty, i.e., to what extent must such mitigating factors be considered, if at all. These questions have been raised to DHRM by the agency on administrative review.

The agency appears to argue, as does the grievant, that the hearing officer had no authority to remand the disciplinary action and order the agency to consider mitigating circumstances. This is an issue of first impression. The Rules for Conducting Grievance Hearings specifically provide a hearing officer with the authority, when finding that a policy has been misapplied or unfairly applied, to order the agency to reapply the policy from the point at which it became tainted.[21] As such, the hearing officer made a reasonable conclusion that because the Standards of Conduct mandate consideration of mitigating circumstances (based on the hearing officer's assumed interpretation), the hearing officer had the authority under the grievance procedure to order the agency to reconsider the disciplinary matter and take into account those mitigating circumstances. However, while the hearing officer's analysis is understandable, this Department does not believe it is the appropriate result under the grievance procedure and the Rules for Conducting Grievance Hearings.

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 Employment Dispute Resolution."[22] If a hearing officer remands a disciplinary action to the agency to consider mitigating circumstances, as was done in this case, there is no mechanism under the grievance procedure for the grievance to return to the hearing officer following the agency's assessment of mitigating circumstances.[23] The hearing officer will never be able to fulfill his or her own duty to consider mitigating factors in such a case. Remand on these grounds inappropriately delegates to the agency the hearing officer's authority and duty to consider mitigating circumstances. The hearing officer must assess mitigating circumstances and a remand of this type prevents such an assessment. Therefore, it is not consistent with the grievance procedure and the Rules for Conducting Grievance Hearings to remand this disciplinary action to the agency to consider mitigating circumstances. That portion of the hearing decision is hereby vacated.

Even in a case where there is no evidence that the agency considered any mitigating circumstances (which is not necessarily the case here), a hearing officer can still fulfill the requirement to determine if mitigation is appropriate. While the hearing officer must "give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances," the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness.[24] If the agency presents no evidence of its consideration of mitigating

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[21] *See Rules for Conducting Grievance Hearings* § VI(C).

[22] Va. Code § 2.2-3005(C)(6). The hearing rules also require that the hearing officer consider mitigating and aggravating circumstances. *Rules for Conducting Grievance Hearings* § VI(B).

[23] The only way the grievant could possibly raise this issue would be by filing a new grievance. This result contravenes the policy of resolving grievances fairly and promptly. *Grievance Procedure Manual* § 1.1. Moreover, it adds substantial procedural burdens to the grievant without any added benefit. The agency is also provided with a procedural weapon that could potentially be abused at the expense of a grievant.

[24] *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.

circumstances, then the simple result is there is no agency position on mitigation to which the hearing officer must give deference. The hearing officer should then proceed to assess whether the disciplinary action exceeds the limits of reasonableness to determine if mitigation is appropriate. In the instant case, there is no evidence that the hearing officer has considered the grievant's claims as to mitigating circumstances.

As discussed above, the hearing officer found that DOC Policy 130.1 placed certain duties on the grievant, i.e., self-reporting violations of the rule and inquiring about the status of anyone with whom an employee engages in a relationship. The hearing officer appears to have upheld the agency's disciplinary action based on the implied duty to inquire.[25] Additionally, the agency appears to be disciplining the grievant for not reporting her conduct, yet the evidence is unclear from what policy this self-reporting requirement arises. However, the hearing officer did not consider whether the grievant had sufficient notice of these duties before being disciplined for failing to uphold them. For instance, there is no indication in the hearing record that the agency made the grievant aware of such reporting duties. Because the hearing officer did not consider the grievant's arguments as to lack of notice and other potential mitigating circumstances identified in her request for administrative review, the hearing decision must be remanded for consideration of those factors.[26]

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

The hearing officer must reconsider his decision consistent with this ruling. 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 and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.[27] 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.[28] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[29]

Claudia T. Farr
Director

[25] To the extent the grievant claims that this requirement is a violation of the First Amendment to the U.S. Constitution, that claim appears to be a question of law, more appropriately addressed by a circuit court, should review of this hearing decision reach that point. *See Grievance Procedure Manual* § 7.3.
[26] The Rules for Conducting Grievance Hearings provide a list of three *examples* of mitigating circumstances: lack of notice, inconsistent application, and improper motive. *Rules for Conducting Grievance Hearings* § VI.B.1. This list is not exhaustive, but merely meant to describe some examples of potential mitigating circumstances.
[27] *Grievance Procedure Manual* § 7.2(d).
[28] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[29] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).