Issue: Administrative Review of Hearing Officer's Decision in Case No. 9072; Ruling Date: October 27, 2009; Ruling #2010-2368; Agency: Department of Corrections: Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2368
October 27, 2009

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 9072. For the reasons set forth below, the hearing officer erred in considering inconsistency in discipline as a mitigating factor. In addition, the decision is remanded for further consideration and clarification regarding the other mitigating factors discussed below.

FACTS

The grievant challenged the termination of her employment, effective February 2, 2009, pursuant to a Group III Written Notice issued on February 2, 2009 by the Department of Corrections (the "Department" or "Agency"). The hearing officer upheld the Group III notice but reversed her discharge, reinstating her based on mitigating factors.[1] The agency asserts that the hearing officer abused his discretion through his application of mitigation to reinstate the grievant.

The facts of this case as set forth in the hearing decision in Case Number 9072 are as follows:

1. The Grievant was a correctional officer, previously employed by the Agency for approximately 12 years before the termination of her employment by the Agency.

2. Up until the disciplinary infraction (the "Infraction") which is the subject of this proceeding, the Grievant had no disciplinary history with the Agency. Throughout her employment, the Grievant has received very good annual performance evaluations, rating her at a minimum either "contributor" or "exceeds contributor," including her most recent performance evaluation where she received from her

[1] The grievant requested that the hearing officer reconsider his opinion. In a August 5, 2009 reconsidered decision, the hearing officer affirmed his original decision.

supervisors, as witnessed by their signatures on September 20, 2008, an overall earned rating of "Exceeds Contributor." GE 2 and AE 4.

3. At the time of the Infraction, the Grievant was employed at a level 2 medium security prison institution (the "Facility") where the inmates have no more than 20 years left to serve. At the Facility, the inmates reside in dormitories, not cells and are allowed considerably more movement around the housing units than would be the case if they were housed at higher security level prisons. Tape 4A.

4. On approximately December 3, 2007, the business office staff at the Facility alerted Sergeant M (the "Institutional Investigator") concerning a suspicious money order to a local newspaper by Inmate L ("L"). Tape 3B.

5. The Institutional Investigator began an internal investigation and placed a mail cover on L, allowing the Facility to intercept and check L's mail for any attempted wrongdoing. The suspicious money order related to a notice/announcement to the local newspaper accompanying the money order (the "Notice").

6. The Institutional Investigator copied L's Notice.

7. The Notice read as follows:

> NOTICE
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> Girl of my dreams,
> I say your name means "blind." You say it means "radiant." You're right, of course. But then, you usually are. You lift my spirit with joy and bring a smile to my face. As you celebrate your special day on December 16, remember: you're all that . . . and a bag of chips. You're a cynosure.
>
> You Know Who

AE 2, Attachment F3.

8. In his letter accompanying the money order and the Notice to the editor of the local newspaper, L asked the editor to publish the notice in the December 12, 2007 edition of the paper. AE 2, Attachment F2.

9. The Institutional Investigator allowed the money order, Notice, etc. to proceed to the local newspaper and the Facility also called on the assistance of the Office of the Inspector General ("Internal Affairs") because of the concern that Facility staff might be implicated. Special Agent T ("T") was assigned to the investigation by Internal Affairs.

The Notice eventually was published in the local paper, as L requested. AE 3, Attachment K1.

10. The Institutional Investigator and T began to work together on the investigation. The Warden supplied the investigators with a list of staff and their respective birthdays in December, including the Grievant whose birthday is on December 16, and through this and other means, the investigators were able to deduce that the Grievant was the subject of the Notice. AE 3, Attachment L1.

11. On December 3, 2007, the Institutional Investigator conducted a search of L's personal property and lockers and confiscated numerous articles of contraband, including a large folder titled "Rachel" concerning the Grievant and her family.

12. L was fixated on the Grievant and went to extraordinary lengths to secretly collect information concerning the Grievant and her family, including writing to his cousin to solicit his assistance and devising elaborate schemes to hide the efforts from the Facility. AE 2, Attachments G1-3.

13. L was placed in "special housing" or a segregation unit on December 27, 2007 for the offense of "possession of personal information." AE 3, Attachment I8. L was subsequently placed in general detention "for investigation for possible threat to the orderly operation of this institution." (AE 3, Attachment M) and was ultimately transferred to a higher security level facility.

14. The Grievant admits that she knew of the Notice and that L wrote the Notice and placed the Notice in the local newspaper for her. The Grievant also had admitted that she and L discussed the Notice.

15. The Grievant states that she did not report the Notice and L's actions to her supervisors because it was no big deal.

16. In the context used in the Notice, the word "cynosure" means the center of attraction or attention. See, e.g., Webster's Ninth New Collegiate Dictionary (© 1985).

17. When interviewed on March 10, 2008, the Grievant told T and the Institutional Investigator that she was tired of rumors pertaining to her and L. See also, AE 2, Attachment B2.

18. The Grievant has also admitted that she engaged in conversations with L regarding her school-age child, her adult daughter who works at a different correctional institution and her plans regarding nursing.

19. Pursuant to her Conditions of Employment the Grievant was required to familiarize herself with all applicable procedures and post orders and she was required to acknowledge in writing receipt of a copy of Rules Governing Employees' Relationships with Inmates, Probationers, and Parolees. AE 8.

20. Throughout her employment the Grievant has received continued mandated in-service training regarding the prohibition on fraternization, including recent warnings in 2007 and 2008 about offender manipulations, con games, etc. AE 5.

21. There was no romantic relationship between the Grievant and L.

22. There was no relationship of friendship between the Grievant and L.

23. L is not credible.

24. The Grievant and her family are well known in the surrounding local community in which the Facility is located.

25. The Grievant's father died on May 27, 2008 and L, who by this time had been transferred to a more secure facility, placed a notice in a local newspaper expressing his condolences to the Grievant and her family. The Grievant promptly reported this to the Institutional Investigator.

26. In approximately 1999/2000, a counselor at the Facility (the "Counselor"), was informed by L that L was in love with the Grievant. The Counselor did not report this to anyone at the Facility until she informed the Grievant in July 2008. The Counselor testified that in all her years of work this was the only occasion on which an inmate had informed her that he was in love with a correctional officer.

27. The Facility and the local newspaper have published birth dates of Agency employees.

28. In approximately 2006, a different inmate ("Inmate M") exposed himself to the Grievant at the Facility. The Grievant wrote up a charge and took the matter up with her supervisor at the time, Captain W. Captain W told the Grievant that he would talk to Inmate M but that no formal charges against Inmate M should result. Captain W has since left the Facility.

29. L is obviously internet savvy and was able to access the internet through his work at the Facility's library. See, e.g., Tab 2, Attachments G2-3.

30. An inmate T was paroled on February 13, 2006 and came in to play on the Facility's softball team in July 2006. Tape 5A.

31. Under the facts and circumstances presented in this proceeding and concerning his mitigation analysis, the hearing officer finds that the termination of the Grievant's employment exceeded the limits of reasonableness for the reasons provided below.[2]

Based on the above findings, the hearing officer upheld the Group III Notice explaining that:

> The definition of "fraternization" under Agency O.P. Number 130.1 is extremely broad and the hearing officer agrees with the Agency that the Grievant's failure to report the Notice which L placed in a local newspaper creates, at least, "the appearance of" impropriety. The hearing officer agrees with the Warden that a plain reading of the Notice reveals that it is extraordinary in that it is very explicit in its expression of L's infatuation with the Grievant. L could at some time in the future have begun to broadcast to the world the fact that he published the Notice for the Grievant to express his extreme feelings, with impunity. Furthermore, the Grievant admitted that she discussed with L the Notice and other employee personal matters, including her children, a clear violation of the policy. 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.[3]

However, the hearing officer rescinded the grievant's termination finding that her discharge exceeded the limits of reasonableness.[4] He explained his reasoning as follows:

> Firstly, there was no improper romantic relationship between the protagonists with the attraction and fixation coming from L alone. If left with too much freedom at the Facility, L represented the primary driving threat to the safety and operations of the Facility. Many witnesses testified about L's resourcefulness and unscrupulousness, especially when gathering information from all sources about the Grievant. In 1999/2000 L told the Counselor of his fixation with the Grievant. This was not reported even to the Grievant until July 2008. The Facility's semi-annual shakedowns missed L's voluminous collections of personal information concerning the Grievant and other staff when because of his comment to the Counselor he should have set off alarm bells at the Facility.

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[2] Hearing Decision in Case Number 9072, issued June 25, 2009, pp. 2-5.
[3] *Id.* at 8.
[4] *Id.* at 9.

Inmate C's playing on the Facility's softball team within the policy's prohibited period of "180 days of the date following his or her discharge from Department custody or termination from supervision, whichever occurs last" is remarkable in and of itself. There was no evidence adduced at the hearing whether any Facility supervisor or employee was or was not disciplined regarding this matter. There was also some reference during the hearing to a bet by a warden with an inmate regarding the outcome of a softball game, with the loser having to perform push-ups, but for all the hearing officer can tell, this might have been only a hypothetical question (Tape 5B) and the hearing officer has ignored it for purposes of this decision.

The dismissal by Captain W of the Grievant's charge relating to the inmate indecent exposure was unwarranted and inappropriate when the Grievant did exactly what she should have in reporting the matter to her supervisor.

Supervisor after supervisor and witness after witness for the Grievant testified that they had always seen the Grievant act in a professional manner with appropriate demeanor around inmates. The Grievant's evaluations throughout have been very good over the course of 12 years and she has absolutely no prior disciplinary record. The threat presented by L who is clearly very intelligent and resourceful has finally been recognized by the Agency and he has been removed to a more secure environment where he can be more closely monitored. Despite some comments, the Grievant has clearly learned from the disciplinary process and promptly reported to the appropriate superior at the Facility L's published condolences regarding her father's demise.[5]

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."[6] 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.[7]

Mitigation

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in

[5] *Id.* at 9.
[6] Va. Code § 2.2-1001(2), (3), and (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

accordance with rules established by the Department of Employment Dispute Resolution."[8] EDR's *Rules for Conducting Grievance Hearings* ("*Rules*") 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.[9]

The *Rules* further state that:

> Therefore, 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 mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[10]

This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[11] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

Here, the hearing officer found that the "Grievant admitted that she discussed with L the Notice and other employee personal matters, including her children, *a clear violation of the policy*."[12] (Emphasis added). Moreover, he found that the grievant's behavior constituted misconduct and the agency's discipline was properly characterized as a Group III offense.[13] Group III offenses include "acts and behavior of such a serious nature that the first occurrence normally should warrant removal."[14] Therefore, we must now consider whether the hearing officer abused his discretion by mitigating the discipline in this case.

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[8] Va. Code § 2.2-3005(C)(6).
[9] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original).
[10] *Id.*
[11] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id. See also* Bynum v. Cigna Healthcare of NC, Inc., 287 F.3d 305, 315 (4th Cir. 2002) quoting Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)("[A]an abuse of discretion occurs when a reviewing court possesses a 'definite and firm conviction that . . . a clear error of judgment' has occurred 'upon weighing of the relevant factors.'"; United States v. General, 278 F.3d 389, 396 (4th Cir. 2002) (observing that an abuse of discretion occurs when discretion is exercised arbitrarily or capriciously, considering the law and facts).
[12] Hearing Decision at 8.
[13] *Id.*
[14] D.O.C. Standards of Conduct (Operating Procedure 5-10, XII (A))(Agency Exhibit 7).

Inconsistent Application of Discipline

The hearing officer used a recent parolee's participation in a softball game as a basis for mitigation. Inconsistency in the application of discipline for similar misconduct by other employees is clearly a potential mitigating factor.[15] However, as with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.[16] The hearing decision indicates and the record supports that an employee testified that a parolee played on the facility's softball within 180 days of release, which was a violation of the fraternization policy. Yet, the grievant apparently provided no evidence that any employee involved with the softball event was treated less harshly than the grievant; the hearing decision states that "[t]here was no evidence adduced at the hearing whether any Facility supervisor or employee was or was not disciplined regarding this matter."[17] While the grievant met the burden of providing evidence of similar misconduct (fraternization), she did not meet her burden of proffering any evidence that other employees were treated less harshly than she. Accordingly, the application of the inconsistency in discipline mitigation factor constitutes error in this case.[18]

Parolee Playing on Softball Team

The hearing officer also found that a recent parolee's playing on the Facility's softball team was "remarkable in and of itself." The decision does not explain, however, how this circumstance is by itself remarkable such that the agency's termination of the grievant for a founded Group III offense was beyond the limits of reasonableness. In order to use an act of misconduct alone as a mitigating circumstance, the hearing officer must provide an explanation of how an act of misconduct by another employee or employees, without more, is itself a mitigating factor. Accordingly, the decision is remanded to the hearing officer for further consideration and clarification of this specific conclusion, consistent with this ruling.

The Captain's Failure to Act Upon the Grievant's Report of an Inmate's Indecent Exposure

The hearing officer used as a mitigating factor a Captain's alleged unwarranted and inappropriate dismissal of the grievant's report of an inmate's indecent exposure. An agency's inconsistent application of its own policy could potentially be a mitigating circumstance. For example, where an employee is disciplined for having failed to report

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[15] *Rules* § VI(B)(1).

[16] *See e.g.*, EDR Ruling 2009-2157, 2009-2174. *See also* Bingham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to Kissner v. Office of Personnel Management, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

[17] Hearing Decision at 9.

[18] We recognize that, in many respects, the agency may be better positioned to produce evidence of consistency in discipline because it holds all records of discipline. However, the burden upon a grievant is not particularly onerous. For example, the grievance procedure permits a grievant to request all documents relating to how others have been disciplined for similar misconduct. *Grievance Procedure Manual* § 8.2. A grievant can use such documents (or the lack thereof) in combination with evidence of similar misconduct to support his or her claim of inconsistent discipline.

inmate misconduct (as is the case here), management's routine failure to act upon reports of inmate misconduct might be relevant. Under such circumstance, management's inaction could lead an employee to conclude that reporting such misconduct is pointless.[19]

Importantly here, however, while the hearing officer found that the grievant's failure to report the inmate's newspaper notice created at least an appearance of impropriety, it was grievant's discussions with the inmate of her personal issues that the hearing officer found to be a "clear violation of the policy" properly characterized as a Group III offense. Thus, while the Captain's failure to act might be relevant to charges issued and sustained by a hearing officer for failure to report inmate misconduct, it would appear that the Captain's inaction has nothing to do with the sustained charge of fraternization based on the grievant's improper personal discussions with the inmate. Accordingly, mitigation based on the Captain's inaction would appear misplaced. However, the hearing officer will have the opportunity in his remanded decision to explain how, notwithstanding the above discussion, the Captain's inaction is nevertheless appropriately viewed as a mitigating circumstance for the sustained charge of inappropriate personal discussions with an inmate.

Failure to: (1) Inform the Grievant of the Inmate's Infatuation, and (2) Find Personal Information During Searches

The hearing officer finds that (1) a counselor's failure to inform the grievant of the inmate's infatuation with her (the grievant), and (2) the agency's failure to find contraband personal information about the grievant during searches of the inmate's cell are mitigating circumstances. How these factors relate to the relatively straightforward prohibition in DOC Operating Procedure 130.1 to refrain from discussing personal information with inmates is not explained or readily evident. Employees are prohibited from discussing personal information with inmates regardless of whether or not the inmate is infatuated, or whether or not contraband is found. Without further explanation, it is not evident how these factors are properly considered mitigating factors. If the hearing officer continues to view them as such, explanation is required.

Miscellaneous Factors

Finally, while not specifically objected to by the agency, the hearing officer considered the lack of any romantic relationship between the grievant and inmate; the clever, resourceful, and unscrupulous nature of the inmate; the abundant positive character witness testimony on the grievant's behalf; and the grievant's 12 years of otherwise very good performance as additional mitigating factors.

First, while otherwise satisfactory work performance is grounds for mitigation by agency management under the Standards of Conduct, under the *Rules*, the hearing officer can

[19] We do not suggest that the agency, in fact, routinely ignores its own policies. The discussion here is illustrative only.

only mitigate if the agency's discipline exceeded the limits of reasonableness.[20] Thus, while it cannot be said that otherwise satisfactory work performance is *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which this factor could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[21] The weight of an employee's 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.[22] The more serious the charges, the less significant otherwise satisfactory work performance becomes.[23] Fraternization is clearly a serious charge, normally leading to discharge.[24] Therefore, the grievant's otherwise positive work record should be afforded minimal weight.

As to the intelligent, resourceful, and unscrupulous nature of the inmate being mitigating factors, it is probably fair to assume that many prison inmates are unscrupulous and, further, that agency prohibitions against all forms of fraternization, including personal discussions, are designed to prevent DOC employees from becoming victims of unscrupulous behavior. Moreover, while it may be true that the inmate was intelligent and resourceful, as the hearing decision recognizes in Finding #20, the grievant received, throughout her employment, training on "offender manipulation, con games, etc." More importantly, as the hearing decision reflects, DOC Operating Procedure 130.1, expressly and plainly prohibits "*spending time discussing employee personal matters* (marriage, *children*, work, etc.) with offenders." Accordingly, while this Department is loath to substitute it judgment for that of the hearing officer, it is difficult to see how the cited characteristics of the inmate are appropriately considered mitigating circumstances.

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[20] EDR Ruling No. 2007-1518. Formerly, the *Standards of Conduct* expressly listed both length of service and otherwise satisfactory performance as mitigating circumstances. Ruling 2007-1518 thus addressed both length of service and otherwise satisfactory performance. Since the issuance of this ruling, the *Standards of Conduct* was modified by eliminating "length of service" as a mitigating circumstance. Ruling No. 2007-1518 held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. 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. EDR Ruling No. 2007-1518, at 4-5(footnote omitted).

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] D.O.C. Standards of Conduct (Operating Procedure 5-10, XII (A))(Agency Exhibit 7).

Finally, as to the lack of any romantic relationship between the grievant and inmate, the prohibitions against (i) spending time discussing personal matters such as children and (ii) romantic relationships are both listed as examples of fraternization in DOC Operating Procedure 130.1. Again, fraternization of any sort may be treated as a Group III Offense under DOC Operating Procedure 130.1. The agency did just that and meted out the normal discipline of discharge. Therefore, it is not clear how the absence of a romantic relationship is a mitigating circumstance.

Accordingly, the hearing officer is instructed to reconsider each of these factors and to provide clarification of how, notwithstanding the above discussion, they are appropriately considered mitigating circumstances.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

This case is remanded to the hearing officer for further clarification and consideration as set forth above. The hearing officer shall determine whether, consistent with this ruling, mitigating circumstances remain, which individually or collectively warrant a reduction in discipline. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other new matter addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[25] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[26]

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.[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]

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Claudia T. Farr
Director

[25] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[26] *See Grievance Procedure Manual* § 7.2(a).
[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, 322 (2002).