Issue: Administrative Review of Hearing Officer's Decision in Case No. 9386; Ruling Date: December 21, 2010; Ruling No. 2011-2791; Agency: Department of Corrections: Outcome: Hearing Decision Affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2011-2791
December 21, 2010

The grievant, a former employee of the Department of Corrections ("DOC" or "the agency"), has requested that this Department ("EDR") administratively review the hearing officer's decision in Case Number 9386. For the reasons set forth below, we will not disturb the decision of the hearing officer.

PROCEDURAL FACTS

The procedural facts of this case as set forth in the August 26, 2010 Decision of the Hearing Officer in Case No. 9386 ("Hearing Decision") are as follows:

On February 19, 2010, the grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization. On March 17, 2010, she timely filed a grievance to challenge the agency's action. The outcome of the third resolution step was not satisfactory to the grievant and she requested a hearing. On August 4, 2010, this Department assigned the case to the hearing officer. On August 18, 2010, a hearing was held at the agency's office. The hearing officer upheld the Group III Notice and removal.

TIMELINESS OF THE REQUEST FOR ADMINISTRATIVE REVIEW TO THIS DEPARTMENT

The grievance procedure requires that requests for administrative review must be received by the administrative reviewer within 15 calendar days of the date of the original hearing decision. In this case, this Department received the grievant's request after the 15 calendar day period. Importantly here, however, this Department has long held that a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period.[1] The

[1] EDR Ruling Nos. 2008-1811; 2007-1635. *See also*, Virginia Department of Taxation vs. Brailey, No. 0972-07-2, 2008 Va. App. LEXIS 19 at *6-7 (January 15, 2008) (affirming EDR's determination that an appeal based on inconsistency with policy, which should have been raised with the Department of Human Resource Management (DHRM), but was raised with EDR within 15 calendar days of the original decision, was timely appealed to DHRM). *See also*, EDR Ruling No. 2008-2025 (following a timely request for reconsideration to a hearing officer, a request to EDR for review on grounds other than those raised in the reconsideration request, more than 15 days after the original hearing decision, was untimely.)

reason for this is that the determination of the appropriate administrative reviewer—which, depending on the issue to be reviewed, could be the hearing officer, the Department of Employment Dispute Resolution ("EDR"), or Department of Human Resource Management ("DHRM")—can be somewhat perplexing for parties not familiar with the process.

In this case, the grievant contacted this Department's AdviceLine on September 3, 2010, seeking information about the process of administratively appealing the hearing decision.[2] The grievant asserts that she was informed that she should send her appeal to:

> Director Claudia Farr
> Department of Human Resource Management
> 101 North 14th St., 12th Floor
> Richmond, VA 23219

The above address is incorrect. It combines the name of the EDR Director with the address of DHRM. The appeal was accepted by DHRM on September 9, 2010. It appears that someone at DHRM attempted to forward the package to EDR by striking through the address and writing in its place "600 East Main," which is the street address for EDR. The appeal package, however, never reached EDR and was ultimately returned to the grievant. This Department received the instant request for administrative review on September 28, 2010. We note that the grievant sent a virtually identical request for administrative review to the hearing officer, differing only in the salutation, which the hearing officer timely received on September 8, 2010. The hearing officer has already issued his reconsideration decision.

It is unclear as to exactly what transpired between the grievant and the EDR Consultant. We note, however, that the advising consultant is highly experienced and well aware of the appropriate addresses for any given administrative review. Thus, we believe the most likely scenario in this case is that the grievant misunderstood the information she was given. In fact, as explained below it appears that a portion of this appeal pertains to policy, and therefore should have been sent to the "Department of Human Resource Management--101 North 14th St., 12th Floor--Richmond, VA 23219," but it should have been addressed to "Sara Wilson, Director of the Department of Human Resource Management," not "Claudia Farr" (the EDR Director). As noted, we have held that due to potentially perplexing nature of the appeal process, a *timely* request for administrative review of a particular issue, but initiated with the wrong reviewer, will be directed to the appropriate reviewer and considered timely initiated with that reviewer even if the request is received by the appropriate reviewer outside the 15 calendar day period. Accordingly, we will address the issues appropriate for this Department to address (grievance matters) and allow the grievant to raise the policy issue (timeliness of the discipline) with the DHRM Director within 15 days of the date of this ruling, if she wishes.

[2] Calls to the AdviceLine are confidential and therefore this Department will acknowledge a call only under extraordinary circumstances. The instant case presents an extraordinary case in that the grievant asserts that she was misdirected by the AdviceLine. In order to address this contention, by necessity, we acknowledge that the grievant contacted this Department seeking guidance on the appeal process.

DISCUSSION OF MERITS OF ADMINSTRATIVE REVIEW

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."[3] 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.[4]

FINDINGS OF FACT

The following findings of fact were set forth in the August 26, 2010 Hearing Decision:

> The Department of Corrections employed Grievant as a Senior Corrections Officer at one of its Facilities until her removal effective February 18, 2010. She had been employed by the Agency for approximately 17 years and three months. Grievant was a valuable and capable employee of the Agency. She received evaluations with an overall rating of "Exceeds Contributor." She was [a] member of the Facility's strikeforce, an emergency response team, based on her capabilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
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> The Lieutenant introduced Grievant and Ms. Z in 2007. At the time he introduced Ms. Z to Grievant, he did not know that Ms. Z was a former felon. Grievant and Ms. Z began a romantic relationship. They began living in the same house and sharing financial obligations. Grievant and Ms. Z did not hide their relationship.
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> In March 2009, Ms. Z's Probation and Parole Officer called the home where Grievant and Ms. Z were living and informed Grievant that Ms. Z was on probation with the Department of Corrections. On March 10, 2009, Grievant spoke with the Warden to advise him that she had just learned that Ms. Z was a probationer. The Warden told Grievant that the relationship was a serious violation of policy. Grievant understood this.
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> Grievant moved in with her mother for two or three weeks in response to the Warden's discussion with her. Ms. Z later called Grievant to say she was having financial problems. Grievant decided to move back in with Ms. Z and they would try to avoid being seen in public and avoid being caught.
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> In February 2010, staff working at a Correctional Center informed the investigator at that Correctional Center that Grievant was living with Ms. Z. The

[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3).

> investigator notified a Sergeant at Grievant's Facility of the relationship and an investigation began. On February 11, 2010, Grievant was interviewed by a Special Agent and admitted that she had been living with Ms. Z for the past three years.[5]

Based on these "Findings of Fact," the hearing officer reached the following "Conclusions of Policy":

> Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(25), *Standards of Conduct*, states that Group III offenses include "[v]iolation of DOC Procedure 130.1, *Rules of Conduct Governing Employees' Relationships with Offenders.* Section 135.1(XII)(B)(26) states that Group III offense [sic] include:
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> > Fraternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from Department custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Director on a case by case basis (see Operating Procedure 130.1, Rules for Conduct Governing Employees Relationships with Offenders.)
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> > Fraternization is defined as:
> >
> > The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing staffs' personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.
> >
> > Offender is defined as:
> >
> > An inmate, probationer, parolee or post release supervisee or other person placed under the supervision or investigation of the Department of Corrections.
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> Ms. Z was a probationer and, thus, an offender under Operating Procedure 130.1. Grievant learned that Ms. Z was a probationer in March 2009. Grievant moved out of the house with Ms. Z after speaking with the Warden but then a few

[5] Hearing Decision at 2-3.

weeks later moved back in to resume her romantic and financial relationship with Ms. Z. Grievant fraternized with an offender contrary to Operating Procedure 130.1.

> Group III offenses include:
>
> > Fraternization or non-professional relationships with offenders who are within 180 days of the date following their discharge from the Department custody or termination from supervision, whichever occurs last. Exceptions to this section must be reviewed and approved by the respective Regional Director on a case-by-case basis (see Operating Procedure 130.1, Rules of conduct Governing Employees Relationships with Offenders).

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action with removal.

Grievant argues that her actions had no impact on her work performance and no impact on the Agency's operations. The Agency did not establish that Grievant's work performance was adversely affected by her relationship with Ms. Z or that the relationship had a material impact on the Agency's operations. Operating Procedure 130.1 is drafted broadly to address as many circumstances involving interaction with Agency employees and offenders. It is clear that the Agency intended its fraternization policy to establish a prophylactic rule so that it would not have to look behind the circumstances of each case to determine whether an employee's actions actually had an adverse impact on the Agency's operations. If the Hearing Officer were to reverse the disciplinary action because Grievant's actions did not adversely affect her work performance or the Agency's operations, the Hearing Officer would essentially be rewriting the Agency's policy. Under the Rules for Conducting Grievance Hearings, Hearing Officers are not permitted to disregard or circumvent Agency policy.

Grievant argued that the Warden instructed her she could continue the relationship as long as it was not in public. The Warden denies giving such an instruction and insisted he informed Grievant that her actions were contrary to the Agency's policies and should cease. If the Hearing Officer assumes for the sake of argument that the Warden gave such an instruction and that the Warden had sufficient authority to modify the Agency's fraternization policy, they would not be a basis to change the outcome of this case. Grievant was unable to keep her relationship with Ms. Z hidden as evidenced by the fact that there was a complaint that ultimately led to disciplinary action against her. If Grievant had been successful in keeping her relationship hidden, no disciplinary action would have been taken.

> *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 Employment Dispute Resolution…." 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.
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> This case is unfortunate. Grievant was a good and valuable employee of the Agency. She performed her duties well. She was dedicated to the Agency and successful in her career. Her relationship with Ms. Z did not influence her work performance. She entered a relationship with Ms. Z without knowing that Ms. Z was a former felon. The Agency's policy, however, prohibits an employee from having a relationship with a probationer.[6]

Based on the forgoing, the hearing officer upheld the discipline issued by the agency.[7]

In his October 19, 2010 Reconsideration Decision, the hearing officer upheld his original hearing decision. The Reconsideration Decision stated in pertinent part that:

> Grievant's length of service and good work performance were mentioned in the Original Hearing Decision. This evidence, however, in itself and when considered with the other facts of this case, is not sufficient to mitigate the disciplinary action.
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> Grievant argues that the Agency's action against her was based on retaliation. Grievant offers no evidence to support this assertion. It is purely speculation. The evidence shows that the Warden believed Grievant had ended the relationship in accordance with his instructions and only took disciplinary action once he learned that she had disregarded his instructions. The Agency took disciplinary action against Grievant because she disregarded the Warden's instructions and not because she engaged in a protected activity.

[6] Hearing Decision at 3-5, footnotes from original decision omitted here.
[7] *Id.* at 5.

Grievant argues that the Agency's action against her was based on discrimination. No credible evidence was presented to suggest that the Agency's disciplinary action or any other action was based on unlawful discrimination against Grievant.

Grievant offers what she considers as new evidence but none of that evidence is material or evidence that would likely produce a new outcome if the case were reheard. For example, Grievant contends that she was forced to reimburse the Agency for making a phone call in 2007 to Ms. Z and can now offer proof of that call. Such evidence is irrelevant because the Agency admits that it knew of Grievant's relationship with Ms. Z and that the Warden instructed Grievant to end the relationship. Grievant was disciplined for resuming the relationship after Grievant learned that Ms. Z had a criminal history.[8]

DISCUSSION

The grievant has objected to several aspects of the hearing decision which are discussed below.

Findings of Fact

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and grounds in the record for those findings."[10] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[11] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[12] 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.

Here, the grievant essentially contests the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations of disputed facts are within the hearing officer's

[8] Reconsideration Decision at 2.
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.

authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate.[13] This Department cannot find that the hearing officer exceeded or abused his authority where, as here, the findings are supported by the record evidence, i.e., witness testimony, and the material issues in the case.

In this case, the facts are undisputed that the grievant had a continuing relationship with an ex-offender. The grievant asserts that while she had a continuing relationship, the Warden was aware of it and merely instructed her not to be seen with Ms. Z. The hearing officer, however, found that the Warden had instructed the grievant to end her relationship with Ms. Z., not merely hide it.[14] The finding that the Warden instructed the grievant to end her relationship with Ms. Z. is supported by record evidence.[15] It is undisputed that she did not. The grievant counters that she was only told that she should not be seen with Ms. Z., in essence, that she instructed not to be caught with Ms. Z. Thus, the Warden's version of the facts differs significantly from the grievant's. It is within the sole discretion of the hearing officer to determine which version of facts he adopts. This Department will not second-guess the hearing officer's factual determinations so long as there is record evidence supporting his findings. In this case, the hearing officer accepted the Warden's version of facts, which has record evidence support. Thus, this Department has no basis to disturb the hearing officer's findings regarding the Warden's instruction to the grievant regarding her relationship with Ms. Z.[16]

New Evidence

The grievant asserts that she has new evidence obtained after the hearing showing that, in 2007, she had been required to pay for personal phone calls made to Ms. Z. Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence."[17] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended.[18] However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party claiming evidence was "newly discovered" must show that

[13] *Rules for Conducting Grievance Hearings* § VI(B).
[14] Reconsideration Decision at 2.
[15] Hearing recording at 44:45-57:30. *See also* Grievant Exhibit 3 at pg. 2 (Hand written note by Warden stating that "I told [the grievant] to stay away from this lady until she completes her probation.")
[16] The grievant also objects to the hearing officer's failure to mention that Ms. Z had obtained the Warden's Blackberry number. Ms. Z asserted that it was left on a table at the restaurant where she had served the Warden. The Warden denied leaving his number for her. Again, this represents a disputed fact, one that the hearing officer must decide. Moreover, hearing officers are not required to mention all facts that are raised at hearing, particularly those of questionable relevance.
[17] *Cf.* Mundy v. Commonwealth, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd on reh'g*, 399 S.E.2d 29 (Va. Ct. App. 1990) (en banc) (explaining "newly discovered evidence" rule in state court adjudications); *see also* EDR Ruling No. 2007-1490 (explaining "newly discovered evidence" standard in context of grievance procedure).
[18] *See* Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

> (1) the evidence is newly discovered after the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[19]

Here, the grievant has provided no information to support a contention that the evidence to which she cites should be considered newly discovered evidence under this standard. Moreover, it is difficult to see how this information is relevant to the issue for which the grievant was disciplined: fraternization with Ms. Z. At that time (2007), management apparently had knowledge of the grievant's relationship with Ms. Z, but like the grievant, no knowledge of her offender status.

Inconsistency with Policy

The grievant asserts that the decision is inconsistent with policy because the agency did not take action "as soon as practicable." This is essentially a policy issue, thus the DHRM Director has sole authority to make a final determination on whether the decision comports with policy.[20] Accordingly, the grievant may, within **15 calendar days** of the date of this ruling, request administrative review from "Sara Wilson, Director of the Department of Human Resource Management" at: 101 North 14th St., 12th Floor, Richmond, VA 23219. To the extent that the grievant seeks to raise the timeliness of discipline issue as a potential mitigating circumstance, this argument is addressed below in the "Mitigation" section.

Mitigation

The grievant essentially contends that the hearing officer erred by not mitigating the discipline in this case. Under 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 the Department of Employment Dispute Resolution."[21] EDR's *Rules for Conducting Grievance Hearings ("Rules")* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "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."[22] 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,

[19] *Id.* (emphasis added) (quoting Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).
[20] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).
[21] Va. Code § 2.2-3005(C)(6).
[22] *Rules for Conducting Grievance Hearings* VI(A).

> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[23]

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.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management.[24] Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets "exceeds the limits of reasonableness" standard set forth in the *Rules*.[25] This is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate,[26] abusive,[27] or totally unwarranted.[28] This Department will review a hearing officer's mitigation determination for abuse of

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[23] *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also* Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Court "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors").

[24] Indeed, the *Standards of Conduct ("SOC")* gives to agency management greater discretion in assessing mitigating or aggravating factors than the *Rules* gives to hearing officers. An agency is relatively free to decide how it will assess potential mitigating and aggravating circumstances. Thus, as long as such decisions are consistent, based on legitimate agency concerns, and not tainted by improper motives, an agency's weighing of mitigating and/or aggravating circumstances must be given deference by the hearing officer, and the discipline imposed left undisturbed, unless, when viewed as a whole, the discipline exceeds the bounds of reasonableness.

[25] While hearing officers make *de novo* fact-findings under the *Rules*, a hearing officer's power to *mitigate* based on those fact-findings is limited to where his or her fact-findings support the "exceeds the limits of reasonableness" standard established by the *Rules*. Also, where more than one disciplinary action is being challenged in a hearing, the hearing officer's mitigation analysis should consider both whether each individual disciplinary action exceeds the limits of reasonableness and whether the challenged disciplinary actions, in the aggregate, meet this standard.

[26] *See* Parker, 819 F.2d at 1116.

[27] *See* Lachance, 178 F.3d at 1258.

[28] *See* Mings, 813 F.2d at 390.

discretion,[29] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this case, the grievant disclosed her inadvertent fraternization in March of 2009 when she first became aware that Ms. Z was still under the supervision of the agency. The Warden testified that he believed the grievant's contention that before March of 2009, she had been unaware that Ms. Z was under DOC supervision. Thus, he gave her the benefit of the doubt, took no action against her except to instruct her to terminate her relationship with Ms. Z. The grievant now appears to argue that the Warden was wrong to not take action against her in March 2009 or even earlier. There is absolutely is no reason to view the Warden's grant of the benefit of the doubt in 2009 as a mitigating factor.

APPEAL RIGHTS AND OTHER INFORMATION

The grievant has **15 calendar days** from the date of this ruling to raise, as a policy matter, the issue of the timeliness of the discipline issued against her. 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, which will be when the DHRM Director issues her ruling, unless the DHRM Director remands the decision to the hearing officer, in which case the original decision will become final when the hearing officer issues his decision.[30]

In the case that the grievant elects not to appeal the DHRM Director, the original decision becomes final **15 calendar days** from the date of this ruling.

Once the decision becomes final, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the decision becoming final.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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Claudia T. Farr
Director

[29] "'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.*
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).