

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9654; Ruling
Date: December 12, 2011; Ruling No. 2012-3137; 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 2012-3137
December 12, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9654. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The facts, related conclusions, and decision of this case, as set forth in the hearing decision in Case Number 9654, are as follows:

On February 2, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for fraternization.

On February 26, 2009, Grievant 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 July 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case do to the unavailability of a party. On September 15, 2011, a hearing was held at the Agency's office.

* * * * *

The Department of Corrections employed Grievant as a Corrections Officer at one of its Facilities until her removal effective February 2, 2009. The purpose of her position was to, "provide security and supervision of adult offenders at this facility." Grievant received training regarding the Agency's prohibition against fraternization with offenders. She had been employed by the Agency for approximately 12 years prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing. In September 2008, Grievant received an overall rating of Exceeds Contributor on her annual performance evaluation.

The Facility is a Level II security prison. Inmates residing at the Facility live in dormitories, not cells. Inmates are permitted to have storage lockers in which to keep personal items. Inmates are permitted to subscribe to newspapers and receive and read those newspapers at the Facility. The Facility is located in a rural part of the Commonwealth. The Newspaper is published at least two times per week in the Locality. Employees at the Facility frequently are referenced in stories written in the Newspaper.

The Inmate began his incarceration at the Facility in 2000. As compared to other inmates at the Facility, the Inmate was highly focused on the personal lives and families of employees working at the Facility. The Inmate subscribed to the Newspaper and routinely read the Newspaper in depth. If an article in the Newspaper referred to an employee at the Facility, the Inmate would often cut out the article and save it. He would approach employees at the Facility and ask them questions about whether they had read an article in the Newspaper about a particular employee.

Grievant was responsible for supervising inmates. To carry out those duties, she had daily contact with the Inmate and other offenders at the Facility.

The Inmate was infatuated with Grievant.

Grievant's birthday is December 16.

On December 3, 2007, the Sergeant obtained a copy of a letter that the Inmate had written to the Newspaper seeking to place a personal ad. The ad was entitled "Girl of My Dreams." The Sergeant had obtained permission from the Assistant Warden to review the mail of the Inmate for illegal or unauthorized correspondence between the Inmate and correctional staff at the Facility.

On December 16, 2007, the Newspaper published an ad stating:

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.

On December 26, 2007, the Inmate drafted a letter to his cousin seeking information about Grievant. The Inmate wrote:

The information I want you to look up is about [Grievant]. She was born [Grievant's former name] on [location] in Virginia, possibly [Location] County. And she currently lives in [Location] County. She has a daughter in [Location] Central High School in 11th grade named [Name]. Remember, [Grievant's first name] codename is Rachel. Always use the name "Rachel"

In January 2008, the Inmate approached Grievant and showed her the personal ad and told her it was directed at her. Grievant was offended by the Inmate's behavior and told him not to do anything like that again. The Inmate asked if she was going to report him. Grievant did not say anything and walked away. Grievant did not report the incident to a supervisor.

The Inmate was removed from the dormitories and placed in a segregation cell.

The Sergeant searched the Inmate's personal property and lockers and recovered numerous newspaper articles that were connected to employees at the Facility and the family members of those employees. For example, a picture in the Newspaper showed approximately 13 employees of the Facility who had "adopted" three local families for the Christmas holiday. The picture caption mentioned that the employees provided food items to help the families. The Inmate collected an article about a home the Warden had restored. One article showed the names of people involved in real estate transfers in the locality for November 2007. Another article showed the names and birthdays and anniversaries of individuals living in the Community.

On March 10, 2008, Grievant was interviewed by Special Agent T and the Sergeant regarding the allegations against her. She stated:

I have never engaged in any type of sexual or romantic relationship with [the Inmate]. I have never written him any letters or received any letters from him. I have never received any telephone calls from him. I have never given him any personal information to him about my age, home address, or birthdate. I have never had any sexual or romantic conversations with him. It is common knowledge that I live in the community because there are several inmates that have been here at [the Facility] that are distant relatives of mine and my children are always in the local paper. I have been approached by [Inmate] with the local newspapers and he has shown the articles containing my children etc. I never discussed anything about the meaning of my name. However, he did tell me that he had written an article and had it published in the newspaper for my birthday. I saw the paper and read it and told him not to do it again. I have also heard from other inmates that I

allegedly gave [Inmate] some money but that is not true. I am not engaged in any type of relationship with him or any other inmate. I do not know why inmates would say these things. I did not tell any staff member (supervisors) about the article or my conversations with [Inmate] about the article.

On March 10, 2008, Special Agent T and the Sergeant interviewed the Inmate. The Inmate wrote a statement as follows:

The articles in my property are retrieved from the local newspaper and were not used for any illegal purpose. Those articles were used for conversation with staff and for scrap booking. I have never used any of this information to offend or threaten any officers at [Facility] while at work or at home. I have no intention of using any of the information from the articles to contact any of the officers or for any personal gains. In regards to the allegations that I am engaged in any type of relationship (romantic, or sexual) with [Grievant], I had engaged in general conversation with [Grievant] about the Bible, and general things, but never about anything personal. I have nothing more to say about the information that has been presented to me by [Special Agent T and the Sergeant] concerning the article that I placed in the local newspaper. I admit writing to my cousin asking him to obtain personal information about [Grievant] for me because I wanted to stay in touch with her when I was released. I have nothing further to say about that article.

On March 16, 2008, the Inmate drafted two letters intended for Grievant and gave them to Corrections Officer F. The Inmate asked that the letters be given to Grievant. In the letters, the Inmate attempted to inform Grievant of his interview with Special Agent T and the Sergeant and instruct Grievant how to answer questions from Special Agent T and the Sergeant about their relationship. Corrections Officer F gave the letters to a supervisor and did not deliver them to Grievant.

The Inmate was transferred to another Facility on April 11, 2008. The Inmate read that Grievant's father died in May 2008 and then placed an ad in a newspaper offering his condolences to Grievant. When Grievant learned of the Inmate's actions in June 2008, she was upset and became more fearful of the Inmate.

On October 31, 2008, Grievant met with Special Agent T for a second interview and statement. Grievant wrote:

[Special Agent T] questioned me regarding statements that [the Inmate] made indicating that I provided him with personal information such as my birthday and other personal information about my family. This is not true. I had never discussed my personal information with [Inmate] or anything about my family. It is common knowledge that I have a daughter who works at [Another Facility] and her name is [Name]. Her last name is not [Grievant's last name] however, it was [J] then [T], and now it is [J]. Many inmates have been to [the Facility] from [the Other Facility] that have come to me and other officers and have stated that they knew that I had a daughter that worked at [the Other Facility] but I've never told them that was true or denied it. My daughter's name as well as the rest of my family's name is always in the local newspaper. My family is well known in the local county. I have never discussed with [Inmate] anything about liking him or wanting to be in a relationship with him. I have never told [the Inmate] that [Sergeant M] and I were involved in a romantic or physical relationship however it is common knowledge at [the Facility] that [Sergeant M] and I have been involved in a relationship and are currently involved in a relationship. [Sergeant M] has never discussed our relationship with [Inmate] to my knowledge. In May when my father passed away, I saw an article [in] June in the [Newspaper B] that [Inmate] had written expressing his condolences for the loss of my father. This upset me because I didn't understand how or why he was still sending and writing these articles. I also received a call from [Officer J] who worked at [the Facility] who saw another article in the [Newspaper], she too was upset by the article. I do not understand why he is allowed to have access to these local newspapers. I am concerned for my safety when he is released that he may stalk me or attempt to locate me upon his release or attempt to contact me. I am not interested in him or want any contact with him. I have had no relationship with them or made no attempts to have any type of relationship with him. [Counselor] at [the Facility] informed me that [Inmate] told her that he was "in love with me and that there was nothing that he wouldn't do for me." I would like for you to talk to her. This is my statement.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and

behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”

Group III offenses include, “violation of DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders.*” The Agency has a “zero tolerance” regarding fraternization.

The Agency contends that Grievant acted contrary to Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders.* The procedure “establishes rules of conduct that will be observed by employees when interacting with offenders under the direct supervision of the Virginia Department of Corrections.”

To determine whether an employee acted contrary to Operating Procedure 130.1, the Hearing Officer must focus on the behavior of the employee. The behavior of an offender may provide context to the analysis but the key to determining whether an employee acted contrary to Operating Procedure 130.1 is the behavior of that employee. In this case, the Inmate was aware of personal information about Grievant. The Inmate’s knowledge of personal information about Grievant is not, in itself, of significance. Only if Grievant provided that personal information to the Inmate does the Inmate’s knowledge of Grievant’s personal information become significant with respect to disciplinary action.

There are several ways an employee can act contrary to Operating Procedure 130.1. First, an employee who engages in fraternization acts contrary to Operating Procedure 130.1. 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 employee personal matters (marriage, children, work, etc.) with offenders and engaging in romantic or sexual relationships with offenders.

Grievant did not fraternize with the Inmate. No credible evidence was presented to show that Grievant devoted excessive time or attention to the Inmate. No credible evidence was presented showing that Grievant discussed personal matters such as marriage, children, or work with the Inmate. No credible evidence was presented to show that Grievant engaged in a romantic or sexual

relationship with the inmate. No credible evidence was presented showing that Grievant gave the appearance of these behaviors.

The Inmate was aware of personal information about Grievant. For example he knew her birthday. He knew the names of her children and where they went to school or where they worked. The Agency has not presented sufficient evidence to show that Grievant provided personal information to the Inmate.

It is unclear how the Inmate learned of Grievant's birthday. The Newspaper publishes the birthdates of individuals in the community. One of the documents found in the Inmate's possession was a list of names of individuals with birthdates published in the Newspaper. The Inmate could have learned of Grievant's birthday from the Newspaper. Grievant, however, testified that she attempted to determine whether her birthdate had been published by the Newspaper. She could not find where the Newspaper had published her birthday. Grievant testified that on at least two occasions, the Facility had circulated a list of employee birthdates. An Agency witness denied that the Facility circulated a list of employee birthdates. The Agency witness admitted that the Warden's practice was to give an employee candy and a card on his or her birthday. The Agency asserted that the Inmate learned of Grievant's birthday from Grievant. No evidence was presented showing that Grievant told the Inmate of her birthday. Although it is possible that the Inmate learned of Grievant's birthday from Grievant, it is also equally likely that he learned the information from other sources. The Agency has not established that Grievant disclosed her birthday to the Inmate.

The Inmate could have learned about Grievant's daughter in high school from articles in the Newspaper about her. No credible evidence was presented to establish that Grievant informed the Inmate of personal information about her youngest daughter. The Inmate could have learned about Grievant's older daughter who worked in another Facility because that information was common knowledge among staff and others at the Facility. No credible evidence was presented to establish that Grievant informed the Inmate of personal information about her older daughter.

The Agency argued that Grievant had acknowledged that she engaged in personal conversations with the Inmate regarding her school age child and her adult daughter who worked at another Correctional Facility. The Agency did not present any evidence to support this allegation.

In short, no credible evidence was presented to establish that Grievant conveyed personal information about herself or her family to the Inmate.

Second, an employee acts contrary to Operating Procedure 130.1 when he or she engages in Improprieties. Improprieties are defined as:

Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, Standards of Conduct and Performance.

The Agency has not established an association between Grievant and the Inmate. Grievant did not provide the Inmate with personal information or take action that would establish a non-professional association with the Inmate. Grievant's failure to report to a supervisor her conversation with the Inmate in which he disclosed the Newspaper's ad, is not in itself, sufficient to establish the appearance of improprieties. Grievant told the Inmate not to repeat his behavior because she was annoyed with what he had done. The fact that Grievant was angered by the Inmate's action creates the appearance of an absence of an association or personal relationship.

Third, an employee acts contrary to Operating Procedure 130.1 by failing to report offender boundary violations. The Operating Procedure provides:

Employee Responsibilities – In addition to complying with the above procedures, employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.

Placing an ad in the Newspaper to reflect romantic expectations was inappropriate behavior by the Inmate. He crossed the boundary of what constituted an appropriate relationship between offenders and corrections officers. Grievant was obligated by Operating Procedure 130.1 to report the Inmate's behavior to the Agency. Grievant failed to do so thereby acting contrary to Operating Procedure 130.1. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for violating Operating Procedure 130.1. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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.

Grievant was obligated to report the Inmate’s conversation with her when he disclosed he had placed an advertisement about her in the Newspaper. Grievant testified that she did not report the Inmate’s action because she had been told by her building supervisor that she should “suck it up” with respect to inappropriate behavior by offenders directed towards her. She was discouraged from “writing up” inmates but was told to talk to them about their behavior. She reported an offender who exposed his genitals but the charges were not prosecuted. It is not surprising that female corrections officers might experience more attention than male corrections officers from male offenders. One of the purposes of Operating Procedure 130.1 is to minimize the amount of inappropriate attention by compelling employees to report inappropriate behavior by offenders. Placing an ad in a newspaper was an unusual and significant action by the Inmate. It exceeded the level of heightened attention a female correctional officer typically would expect working in an Institution with male offenders. Grievant should have reported the Inmate’s behavior rather than putting up with it.

Grievant presented evidence suggesting Operating Procedure 130.1 was not followed with respect to other offenders. Those offenders were not similarly situation to Grievant. None had placed an ad in a newspaper showing affection for a corrections officer. Grievant has not established that the Agency inconsistently applied disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.¹

¹ Decision of the Hearing Officer in Case Number 9654 issued on September 26, 2011 (“Hearing Decision”) at 1-10 (footnotes from original decision omitted here).

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.”² 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.³

Challenge to Hearing Officer’s Findings of Fact and Conclusions

The grievant appears to challenge the hearing officer’s fact findings and essentially argues that the agency did not meet its burden of proof. Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁴ and to determine the grievance based “on the material issues and grounds in the record for those findings.”⁵ 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.⁶ 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.⁷ 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.

Specifically, the grievant argues that because there was no finding of fraternization, she had no duty to report the newspaper posting to her supervisors. In addition, the grievant argues that there was no need to report the posting because management was aware of the posting. This Department is not persuaded by the grievant’s arguments. First, fraternization does not appear to be a prerequisite to taking disciplinary action under policy. Procedure 130.1 states that “employees are required to report to their supervisors or other management officials any conduct by other employees that violates this procedure or behavior that is perceived as inappropriate or compromises safety of staff, offenders or the community and any staff or offender boundary violations.” This Department is unable to conclude that the hearing officer erred in upholding the agency’s view that the grievant should have viewed the posting as inappropriate and that she had an obligation to report it. In addition, equally unconvincing is the argument that the grievant

² Va. Code § 2.2-1001(2), (3), and (5).

³ See *Grievance Procedure Manual* § 6.4(3).

⁴ Va. Code § 2.2-3005.1(C).

⁵ *Grievance Procedure Manual* § 5.9.

⁶ *Rules for Conducting Grievance Hearings* § VI(B).

⁷ *Grievance Procedure Manual* § 5.8.

had no obligation to report the posting because management was aware of the posting. There is nothing in policy that would appear to indicate that employees are relieved on their duty to report the misconduct if management may have independently gained knowledge of the inmate misconduct. It is reasonable to presume that the grievant had an absolute obligation to report the posting as soon as reasonably possible but the hearing officer found that she never reported it and that failure was misconduct. We find no error with the hearing officer's ruling on this issue.

Inconsistency with Agency Policy

The grievant's request for administrative review also challenges whether the hearing officer's decision is inconsistent with agency policy. The Department of Human Resource Management ("DHRM") has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The grievant has raised the same objections with DHRM that she has raised with this Department. We have addressed them above as a matter of compliance with the grievance process and now DHRM may address them as a policy matter.

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.⁹ 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.¹⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹¹

Claudia T. Farr
Director

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653; 378 S.E.2d 834 (1989).

⁹ *Grievance Procedure Manual* § 7.2(d).

¹⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹¹ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).