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**ADMINISTRATIVE REVIEW**

In the matter of the Virginia Department of Corrections  
Ruling Number 2023-5545  
May 16, 2023

The Virginia Department of Corrections (the “agency”) has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11889. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11889, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Corrections employs Grievant as an RNCB, Health Authority at one of its facilities. She began working for the Agency on December 10, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for administering the Facility’s Health Department. Grievant reported to the Regional Nurse Manager (RNM). The RNM did not work at Grievant’s Facility. The RNM was a Registered Nurse who reported to the Chief Nurse and supervised the Health Authorities at the facilities within their assigned region. The RNM was responsible for overseeing between 15 and 20 facilities.

RN H and RN Ha were full time State employees who reported to Grievant. RN T was a contract nurse who reported to Grievant. They worked at the Facility with Grievant.

The Facility uses an electronic recordkeeping system called “Sapphire” to document when medication was distributed to inmates.

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<sup>1</sup> Decision of Hearing Officer, Case No. 11889 (“Hearing Decision”), March 22, 2023, at 2-5 (citations omitted).

Several inmates in the Facility needed to receive medication including insulin on a frequent basis. Their health depended on it. The Facility conducted what were referred to as “treatment lines” or “pill lines” or “pill passes” where nurses gave medication to inmates. Nurses were to be escorted by corrections officers to ensure their safety. If nurses did not receive security escorts it meant that inmates did not receive their medication. Agency employees knew that the failure to provide escorts to nurses would result in inmates not receiving medication.

On several dates, the Facility was short-staffed. In addition, the Facility was sometimes “locked down” which made it more difficult for nursing staff to receive security escorts. On some occasions, no corrections officers were available to assist nurses.

Approximately 15 times between December 29, 2021 and January 14, 2022, diabetic and treatment lines were not completed. This meant that some inmates did not receive insulin, sliding scale insulin, glucose checks, blood pressure checks, and essential medications.

When staff did not dispense medication to inmates, they would write in Sapphire that “no security escort available” or use similar wording. Grievant instructed them to do so.

On December 29, 2021, Grievant sent the Major an email:

It is imperative that we complete sick call this weekend. Inmates must be seen within 72 to 96 hours of the request being received in medical. We are out of compliance this week due to shortages and modified lockdowns. All assistance you provide is appreciated.

On December 30, 2021 and December 31, 2021, Grievant was not made aware that a security escort was not available. On January 1, 2022 and January 2, 2022, Grievant was not working. On January 4, 2022, Grievant was informed that a treatment line was not completed. She notified the Major. On January 5, 2022, Grievant was not informed that the treatment line was not completed. On January 6, 2022, Grievant was informed that a security escort was not provided for the midday run. Grievant notified the Major. On January 7, 2022, Grievant received a report that no escort showed up for some buildings. She called the Watch Office and the Major to express her concerns. On January 8, 2022, January 10, 2022, January 11, 2022, January 12, 2022, and January 13, 2022, Grievant was not informed that the treatment line was not completed.

On January 2, 2022, Grievant sent the Warden an email. As part of that email, Grievant wrote, “We have to take advantage of a security escort when one is available these days and that someone requires a swift change of plans, as appropriate, to facilitate meeting unified goals.”

On January 2, 2022, Grievant sent the Warden an email informing him of the comments from one of her nurses.

There is so much confusion as to what and where staff had to go. Then not to mention finding officers to take us to the pods/buildings. There are 7 yellow zones and one red zone DUW. So the nursing staff has to go to 2 to 3 buildings for pill-pass and diabetes. Security staff have not had enough officers to stay with nurses in the pods, because I was getting temperatures and giving out pills in DUW and going cell to cell with only the officer in the booth to cover me. No one to round with me. Also I had two other nurses to say the same thing when they went to give pills themselves.

On January 4, 2022, Grievant sent an email to the Warden, "Medical staff reported the listed concerns regarding the weekend operations. \*\*\* Nurses reported that the booth officer was the only officer present, observing them, as they made medication rounds in the building for pill pass. \*\*\* Nurses documented they were unable to complete assessments and medications in the red zone due to no escort available when called for (Sunday morning (rounds) and evening (meds-pm)). \*\*\* I am available tomorrow morning after 9:00 a.m. to discuss these concerns." On January 4, 2022, the Warden replied to Grievant with a copy to the Major and Assistant Warden, "Aw Major let's discuss in the morning." On January 5, 2022, Grievant forwarded the email to the RNM, "Just a fee. Security plans to address."

On January 6, 2022, Grievant sent the Assistant Warden an email, "Today, the officer escorting the RN was unable to go into the red zone; therefore, the nurse did not enter to complete routine checks and medication passes for the inmate population in the DUW. \*\*\* Any assistance you can provide is appreciated."

On February 2, 2022, the RNM entered Grievant's Facility. The Warden asked to speak with the RNM. He told her that an inmate had filed a grievance alleging the inmate had not received insulin on several occasions. He told the RNM that these dates had been documented in Sapphire as "HOLD-Security unable to provide ride to building." Grievant was on leave on February 2, 2022 so the RNM could not speak directly with Grievant.

The RNM spoke with RN H about the issue. RN H told the RNM that Grievant told RN H to write "nurse unable to get escort" in Sapphire. RN H told the RNM that he would go to the Watch Office to try to get someone to escort the nurses. While speaking with RN H, RN Ha entered the room and without being prompted began speaking with the RNM. She told the RNM that they were told to document "no security available." The RNM asked the two employees if the AWO was notified and they said, "no." They said they were told to document on the assignment sheet/report sheet and in Sapphire that they did not have an escort.

On February 14, 2022, RN Ha wrote that

At this time, much of the facility was locked down which exacerbated the problem of getting an escort. When I spoke to [Grievant] about our problems in providing care to the inmates she

told me to put a note in Sapphire stating that ‘nurse was unable to get security escort.’ This was added as a note on the treatment line per her recommendation.

On February 13, 2022, RN H sent the RNM an email explaining there were several days RN H was not able to get into the building because there were no corrections officers available to provide escort. RN H wrote a statement including, “I made every effort to obtain an escort to the building by notif[ying] the medical officer and then going to the watch commander after a certain amount of time had passed about 30 minutes. I also notified my supervisor that I could not get an escort to the building in a timely manner . . . .”

On February 17, 2022, Grievant sent the RNM an email stating, “At no time have I instructed any nurse to hold medications from any inmate. I have educated nurses that medications can only be held if the clinician has ordered it. I expect nurses to document the truth relating to inmate care in the written and electronic medical records at all times.”

It is not a serious health threat if inmates miss treatment lines on occasion and infrequently. It is a serious health threat if inmates miss treatment lines continuously over a series of days.

The agency issued to the grievant a Group III Written Notice with a five-workday suspension on April 15, 2022 for gross negligence on the job that could have resulted in serious injury of an inmate.<sup>2</sup> The grievant timely grieved the disciplinary action, and a hearing was held on February 6, 2023.<sup>3</sup> In a decision dated March 22, 2023, the hearing officer determined that the agency had not presented sufficient evidence to support a basis for disciplinary action and, consequently, rescinded the Group III Written Notice with five-workday suspension.<sup>4</sup> The agency now appeals the decision to EDR.

## DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . .”<sup>5</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>6</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>7</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

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<sup>2</sup> Hearing Decision at 1; Agency Ex. 1.

<sup>3</sup> See Hearing Decision at 1.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

*Issue of Noncompliance*

As a preliminary matter, the agency requests that EDR make a compliance ruling regarding the grievant's rebuttal to the agency's request for administrative review. In particular, the agency alleges that after they sent their request for administrative review, the grievant sent her rebuttal outside of the required 10-calendar-day window, and for that reason, the rebuttal should not be considered in review. The *Grievance Procedure Manual* states that the rebuttal to a request for administrative review "must be received by EDR within 10 calendar days of the conclusion of the original 15-day appeal period."<sup>8</sup> Since the hearing decision was issued on March 22, 2023, the 15-day appeal period ended on April 6, 2023. Ten calendar days after April 6 would have been April 16, which was a Sunday. If the rebuttal deadline falls on a date when state offices are closed, it may be submitted on the next business day.<sup>9</sup> Therefore, the rebuttal must have been submitted by Monday, April 17. The grievant did not submit her rebuttal until April 18, the morning following the end of the required timeframe. The grievant did advise EDR prior to this deadline that she wanted to discuss with her representation before submitting the rebuttal. Nevertheless, the rebuttal does not seem to provide any new information to the record. EDR therefore finds that the same outcome would be reached in this ruling whether or not the rebuttal is considered in this review.

*Consideration of Evidence*

The agency challenges the factual determinations made by the hearing officer. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>10</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

The agency asserts on appeal that the hearing officer's findings of fact and subsequent decision were "inaccurate, inconsistent, and/or unfounded." The assertion is primarily centered on the hearing officer's determination that the grievant notifying the Warden of the lack of escorts was effectively synonymous with notifying the Warden of a lack of medications being dispensed to the patients. The hearing officer found that because escorts are required for dispensing medications, the Warden knew or should have known that if there were no available escorts, medications were not being dispensed, thus showing that the grievant properly notified the Warden

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<sup>8</sup> *Grievance Procedure Manual* § 7.2(a).

<sup>9</sup> *Id.*

<sup>10</sup> Va. Code § 2.2-3005.1(C).

<sup>11</sup> *Grievance Procedure Manual* § 5.9.

<sup>12</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>13</sup> *Grievance Procedure Manual* § 5.8(2).

of the lack of medications.<sup>14</sup> The agency argues that, contrary to what the hearing officer determined, a lack of escorts and a lack of medications are entirely separate matters. The hearing officer's findings of fact appear to be derived from both witness testimony and the parties' exhibits. The hearing record includes witness testimony that security escorts are necessary to dispense medications.<sup>15</sup> In addition, according to the grievant, Operating Procedure 401.1, Security Post Order #41,<sup>16</sup> states that security must "ensure that the nurse is properly escorted when departing the Medical Building for Restorative Housing, also general populations during specific times."<sup>17</sup>

The agency contends in its appeal that security escort availability is an entirely separate issue from patients not receiving medications, and that the basis for the grievant's discipline is solely for not reporting the missed medications. However, the agency does not identify any evidence in the record that the hearing officer failed to consider. For example, the agency does not cite any specific policy or other evidence that supports their assertions. EDR's review of the testimony at hearing is that the evidence is inconsistent and conflicting on the material issue of whether escorts were required. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. EDR therefore finds that the hearing officer's conclusions are based upon evidence in the record and the material issues of the case, and that there was no abuse of discretion by the hearing officer in those findings. Accordingly, EDR declines to disturb the hearing decision on these grounds.

The agency also contests the hearing officer's finding that the grievant was not obligated to report threats of which she was not aware. The agency argues this determination was inconsistent with findings about the grievant's responsibility as the Health Authority. However, when an employee has a duty to report a matter, it is a reasonable conclusion that such employee can only be held accountable to report matters of which they are aware.<sup>18</sup> Therefore, we cannot find that the hearing officer made an unreasonable assumption in this regard. Although the grievant's role as the Health Authority might reasonably suggest the grievant should have been more aware of when medications were not administered, it would be difficult to read the Written Notice as having charged the grievant with misconduct in that regard.<sup>19</sup> Although the grievant was the Health Authority and inmates did not receive medication at her facility, it is unclear the degree to which this serious and potentially life-threatening situation was in her control based on the record. As found by the hearing officer, inmates were not provided medication because security escorts were not available.<sup>20</sup> The agency's appeal does not point to evidence as to steps the grievant failed to take to address the issue other than her failure to report the situation. Indeed, the Written Notice itself seems to identify only the grievant's failure to report the matter as the conduct for

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<sup>14</sup> Hearing Decision at 6-7.

<sup>15</sup> See Hearing Recording at 1:09:00-1:09:30, 2:01:00-2:01:30 (Agency Witness testimony).

<sup>16</sup> The Policy itself is not included in any exhibit by the grievant or agency, but is specifically mentioned multiple times by both parties, both in the hearing and in the exhibits. See Agency Ex. 5 at 19, Agency Ex. 7 at 78. There is also a table included in the agency's exhibits that lists the required number of escorts needed for "pill passes." Agency Ex. 7 at 101.

<sup>17</sup> Agency Ex. 7 at 78.

<sup>18</sup> See also Hearing Recording at 45:20-47:40 (testimony from grievant's supervisor agreeing that you can only report what is known, not receiving discipline for failing to report information before it is known).

<sup>19</sup> See Agency Ex. 1.

<sup>20</sup> Hearing Decision at 6.

which she was disciplined.<sup>21</sup> Consequently, the only issue necessarily addressed by the hearing officer is whether the grievant elevated issues of which she was aware to be addressed.

The hearing officer found that the grievant reported all incidents of which she was aware.<sup>22</sup> To the extent the agency points to evidence that suggests the grievant was aware of issues that were not reported, the record supports the hearing officer's findings of disputed facts about the grievant's awareness, or lack thereof, about the unavailability of security escorts. Nothing in the agency's appeal identifies any evidence contrary to the hearing officer's findings about specific days on which the grievant was unaware of inmates not receiving medication. The hearing officer found that the grievant escalated the concerns about lack of security escorts each time she became aware of the matter.<sup>23</sup> Accordingly, EDR finds that the hearing officer's conclusions regarding this matter are based upon evidence in the record and the material issues of the case, with there being no abuse of discretion in those findings, and EDR declines to disturb the decision on these grounds.

Finally, the agency challenges the hearing officer's finding that the grievant did not instruct her staff to withhold medical treatment. In his decision, the hearing officer found that the grievant only instructed her staff to report that security escorts were unavailable, not that medical treatment was to be withheld.<sup>24</sup> As the agency points out on appeal, the grievant testified to this multiple times in the hearing.<sup>25</sup> The agency's witness testified that the grievant told the nurses to document that there were no escorts to accompany them in dispensing medications, based on the verbal account of two nurses that work under the grievant.<sup>26</sup> However, none of the nurses' written statements in the agency's exhibits say that the grievant told them to withhold medication. The nurses only said that the grievant told them to make a note that they were unable to receive escorts.<sup>27</sup> For similar reasons as above, EDR finds that the hearing officer did not abuse his discretion in finding the facts that are laid out in his decision. To the extent the evidence is in conflict, it is the hearing officer's sole authority to weigh that evidence, determine credibility, and make findings of fact. Accordingly, EDR finds that the hearing officer's conclusions regarding this matter are based upon evidence in the record and the material issues of the case and declines to disturb the decision on these grounds.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>28</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit

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<sup>21</sup> Agency Ex. 1; *see also* Hearing Recording at 1:27:55 – 1:28:15 (Agency Witness testimony).

<sup>22</sup> Hearing Decision at 3-4.

<sup>23</sup> Hearing Decision at 3, 6-7. The Written Notice also charges the grievant with not reporting the matter to her supervisor, the RNM. Agency Ex. 1. The hearing officer found that the agency policy did not require the grievant to make such a report, although it appears the grievant did make the RNM aware in a January 5 email. Hearing Decision at 4, 6. Nothing in the agency's appeal contests these points.

<sup>24</sup> Hearing Decision at 6.

<sup>25</sup> *See* Hearing Recording at 2:42:10-2:42:50, 2:55:15-2:56:00 (Grievant testimony).

<sup>26</sup> *Id.* at 12:45-14:15, 1:28:50-1:29:30 (Agency Witness testimony).

<sup>27</sup> Agency Ex. 3 at 7; Ex. 5 at 21-22.

<sup>28</sup> *Grievance Procedure Manual* § 7.2(d).

court in the jurisdiction in which the grievance arose.<sup>29</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>30</sup>

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Office of Employment Dispute Resolution

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<sup>29</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>30</sup> *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).