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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2023-5496
January 25, 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 11852. For the reasons set forth below, EDR remands the decision for further consideration by the hearing officer consistent with this ruling.

FACTS

The relevant facts in Case Number 11852, as found by the hearing officer, are as follows:[1]

> The Department of Corrections employs Grievant as a Corrections Sergeant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.
>
> Grievant worked with Sergeant S and Sergeant W at the Facility. They all reported to the Lieutenant. Sergeant S and Sergeant W were involved in a sexual relationship. Grievant did not know about the relationship.
>
> The Lieutenant attempted to establish a romantic relationship with Sergeant S. The Lieutenant sent Sergeant S a series of messages including:
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> > That's cuz you f—kn with punk ass ni—as, I suggest you f—k with a real man, everybody else wants to f—k, you need a man to please you. Think about it! That's what mofos do. Get there's and walk away.
>
> Sergeant S showed the Lieutenant's messages to Sergeant W. Although the Lieutenant did not name Sergeant W, Sergeant W concluded that the Lieutenant

[1] Decision of Hearing Officer, Case No. 11852 ("Hearing Decision"), Dec. 19, 2022, at 2-3.

was referring to him. Grievant did not know at that time about the Lieutenant's messages to Sergeant S.

Grievant had difficulty working with the Lieutenant because of the Lieutenant's abrasive management style.

While Grievant and Sergeant W were leaving work one day, Sergeant W told Grievant that the Lieutenant was messaging Sergeant S and during that conversation called Sergeant W a "ni—er." Sergeant W told Grievant that Sergeant W had a screenshot of the conversation. This conversation occurred more than two weeks prior to October 19, 2021. Grievant did not consider Sergeant W to be a person of "good standing or [one] you can trust."

On October 19, 2021, the Captain approached Grievant at a Building doorway and asked Grievant why he was late. Grievant told the Captain that he was not feeling well and ran 10 minutes late and then had to be "Antigen tested." The Captain said he felt he had to "play buffer" when it comes to the Lieutenant when Grievant is late. Grievant told the Captain that the Captain should not feel like that because the Lieutenant will talk about anyone and everyone when he is stressed. Grievant told the Captain that the Lieutenant needs to watch what he says and who he says it to when he gets in these moods. Grievant explained that to his understanding based on what Sergeant W told Grievant, the Lieutenant was talking to Sergeant S on Facebook and called Sergeant W a "ni—er."

Grievant later wrote, "I spoke to [the Captain] candidly about what I had heard because the topic of discussion was [the Lieutenant] and how he manages staff when he is under pressure. [The Captain] and I have had conversations prior to this one about [the Lieutenant] and how he treats myself and [Sergeant W]."

On October 19, 2021, the Captain spoke to Sergeant W and asked about the message he received from the Lieutenant. Sergeant W confirmed receiving the message from the Lieutenant.

The Agency also disciplined Sergeant S for engaging in an improper relationship and failing to report the Lieutenant's offensive language.

The agency issued to the grievant a Group II Written Notice on February 17, 2022 for failure to follow policy, failing to maintain civility in the workplace, and conduct unbecoming of a corrections officer.[2] The grievant timely grieved the disciplinary action, and a hearing was held on November 28, 2022.[3] In a decision dated December 19, 2022, the hearing officer determined that the agency had not presented sufficient evidence to support discipline as a Group II Written Notice and, consequently, reduced the disciplinary action to a Group I.[4] The agency now appeals the decision to EDR.

[2] Hearing Decision at 1; Agency Exs. at 5.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 4-5.

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 . . . ."[5] 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.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency has disputed the hearing decision and hearing officer's assessments on the basis that the hearing officer misinterpreted and misapplied state policy, and did so by "disregard[ing] relevant evidence and testimony related to the ultimate issue of fact giving rise to the discipline the grievant received."

Policy Interpretation

The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[8] Here, the case is largely driven by an underlying interpretation of DOC Operating Procedure 145.3, supplemented with DHRM Policy 2.35, *Civility in the Workplace*, and DHRM Policy 1.60, *Standards of Conduct*.

The relevant portion of DOC Operating Procedure 145.3 states that:

> "Managers, supervisors, and other persons of authority have a duty to promptly take action to eliminate harassment, bullying, discrimination, threatening or violent behaviors, retaliation, and other displays of inappropriate behavior from the work environment once a situation comes to their attention by doing the following . . . ."[9]

As quoted in the hearing decision, the policy then describes a requirement to report a complaint or conduct to an appropriate authority.[10] Further, the policy states that supervisors who "fail[] to take appropriate action *upon becoming aware* of . . . prohibited behavior" will be subject to disciplinary action.[11]

The issue arises in the interpretation of how soon a supervisor must take action after an incident of inappropriate conduct has come to their attention. DOC Operating Procedure 145.3 defines the timing as "promptly," and the hearing officer recognizes this in the decision.[12] However, the hearing officer also found that the agency did not apply the "promptly" standard, but

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[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Agency Exs. at 73; Hearing Decision at 4.
[10] *Id.*
[11] *Id.* (emphasis added).
[12] Hearing Decision at 4.

instead applied an "as soon as possible after the incident occurs" standard.[13] In the request for administrative review, the agency disputes this finding, stating that "promptly" is defined "via its conduct in issuing the written notice . . . ." Further, in the hearing itself, the agency asserts that the reporting of the behavior must be done "upon becoming aware" of the behavior.[14] As found by the hearing officer, the grievant waited "more than two weeks" to report the incident.[15] The grievant did not receive discipline for failing to report information "as soon as possible after the incident," but rather failing to report information more than two weeks after becoming aware of it. The agency has reasonably interpreted the policy language to find that a delay of multiple weeks is appropriately considered a violation of DOC Operating Procedure 145.3. While the hearing officer finds that the Group II Written Notice should be reduced because the grievant ultimately reported the incident,[16] that has no relevance when the timeliness provision of the policy is of key importance based on the facts at hand.

The hearing officer also found that the grievant's "delay in reporting the behavior was in part because of his concerns about the reliability of Sergeant W as a source of information."[17] In the hearing, the grievant provided testimony that he "didn't think [Sergeant W] was a trustworthy person," and that he "assumed he was lying."[18] Regardless of the merit of this belief, the agency points out and EDR agrees that DOC Operating Procedure 145.3 provides that it is not up to the individual reporting the behavior to make a determination as to the merit of the claim – that should be left to the investigation. The agency's position is a proper application of the policy involved to ensure that issues are timely reported and investigated to the extent appropriate.[19]

The hearing officer also found that "the agency did not present any evidence showing the delay had a material impact on its operations."[20] This finding has no bearing on whether the grievant violated the relevant policy. EDR is aware of no language in DOC Operating Procedure 145.3 that allows for a delay in reporting if an impact on the agency is lacking. The agency was not required to present evidence of the impact the grievant's delay had on its operations. The policy language allows the agency to find the grievant in violation without such an impact.

Finally, the hearing officer also found that, pursuant to Va. Code § 2.2-3000, which states that employers shall "encourage the resolution of employee problems and complaints . . . [by allowing] employees . . . to discuss freely, and without retaliation, their concerns with their immediate supervisors and management," "the [a]gency's disciplinary action deter[red] [the g]rievant's right to freely discuss his concerns."[21] This finding also lacks relevance when the focal

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[13] *Id.*
[14] Hearing Recording at 25:30-26:15 (agency testimony states that policy standard for failing to take action "*upon being aware*" of inappropriate behavior results in disciplinary action (emphasis added)); *see also* Agency Exs. at 73.
[15] Hearing Decision at 3; *see also* Hearing Recording at 32:30-33:00 (agency testimony confirming that it took "at least multiple weeks" for the grievant to report the offensive language in dispute).
[16] Hearing Decision at 4.
[17] *Id.* at 4-5.
[18] Hearing Recording at 1:14:40-1:16:00 (grievant testimony providing reasoning for the delay in the report of the offensive language during cross-examination).
[19] While an employee who obtains information of improper behavior from a source they believe unreliable can be a difficult balance, in the particular case at hand, the grievant could have simply reported what Sergeant W reported to him. Appropriate investigators would have then followed up with Sergeant W and be able to ascertain the veracity of the statements.
[20] Hearing Decision at 5.
[21] *Id.*

point is the state policy of DOC Operating Procedure 145.3. The grievant's untimely delay in reporting the offensive language has no relation to him being able to freely discuss his concerns without fear of discipline. Further, the grievant was not disciplined for issues he reported or tried to address, but rather his delay in reporting issues. The fact that the grievant's report came while he was trying to discuss concerns about his employment does not change the matter. To the extent the hearing officer can rely on this provision under these facts, there would need to be factual findings that support a determination that the disciplinary action was issued to retaliate against the grievant in violation of the provision. Such findings are lacking in the decision and the record. Therefore, the hearing officer's reference to Va. Code § 2.2-3000 under the facts of this case is misplaced.

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, EDR finds that the hearing decision is inconsistent with state and agency policy. The factors relied upon by the hearing officer to reach the result that only a Group I Written Notice was warranted are a misapplication of policy, not supported by the record, and/or not relevant. Therefore, the matter is remanded to the hearing officer for further consideration and application of the relevant state and agency policies consistent with this ruling.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[22] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[23]

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued his remanded decision.[24] 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.[25] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[26]

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[22] *See*, *e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[23] *See Grievance Procedure Manual* § 7.2.
[24] *Id.* § 7.2(d).
[25] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[26] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).