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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5430
July 27, 2022

The grievant 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 11802. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in case number 11802, as found by the hearing officer, are as follows:¹

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately 14 years. Grievant had prior active disciplinary action. On May 13, 2021, he received a Group III Written Notice with suspension that was reduced to a Group II Written Notice with suspension.

Grievant brought a neck and face covering called a “mask” to the Facility. Several corrections officers wore masks over their mouths and noses in response to the COVID19 pandemic. Grievant could wear the mask around his neck and then pull it up to cover all of his face. Grievant cut “eye holes” in the mask so he could see out of the mask after pulling it up over his face and head. This gave the appearance of Grievant wearing a white hood which was not consistent with the Agency’s expectations regarding wearing uniforms.

On November 14, 2021, Grievant was working in the window overseeing Pod A where inmates were in the dayroom. The window could be opened so a corrections officer could speak to inmates in the pod below. Grievant pulled the mask over his head. He put the mask on and off several times. He waived the mask over the railing. Grievant made comments to the inmates. The Agency failed to call as a witness the corrections officer sitting near Grievant, but that corrections officer wrote a statement that found Grievant’s comments offensive and told the Warden

¹ Decision of Hearing Officer, Case No. 11802 (“Hearing Decision”), June 30, 2022 at 2-3.

he did not want to work with Grievant because Grievant “jokes around a lot.” One of the inmates complained about Grievant’s comments and his wearing of what looked like a white hood.

Inmate J observed Grievant’s behavior and complained to the Unit Manager and building Lieutenant.

On January 10, 2022 the agency issued the grievant a Group II Written Notice with removal by accumulation, charging the grievant with “inappropriate conduct unbecoming an Officer” under its policies on general conduct, anti-harassment, and employee relationships with offenders.² The grievant timely grieved the disciplinary actions, and a hearing was held on June 10, 2022.³ In a decision dated June 30, 2022, the hearing officer upheld the agency’s discipline, finding that the grievant had “exceeded professional boundaries.”⁴ Further, the hearing officer determined that there were no circumstances warranting mitigation of the agency’s chosen penalty.⁵ The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that the hearing officer erred in upholding his termination because (1) the hearing officer did not address the agency’s true reason for removing him; (2) he did not receive a fair hearing as he was unable to call witnesses; and (3) termination was excessive for the misconduct upheld in the hearing decision.⁹

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁰ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹¹ 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

² Agency Ex. 1; Hearing Decision at 1.

³ See Hearing Decision at 1.

⁴ *Id.* at 4.

⁵ *Id.*

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

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

⁹ See Request for Administrative Review.

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹² 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.¹³ 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 on 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.

Misconduct Sustained

Although the grievant argues that he was improperly "fired due to being racist," a charge the agency did not prove, the record supports the hearing officer's decision to uphold the Group II Written Notice for violation of agency policy.

The hearing officer found that the grievant violated the agency's Operating Procedure 135.2, *Rules of Conduct Governing Employee Relationships with Offenders*, by wearing a white mask with eye holes over his face, taking it on and off multiple times, and hanging it over the railing into the inmate pod area.¹⁴ OP 135.2 provides that "[a]ll employees should maintain a professional appearance and demeanor at all times ..." and "are encouraged to interact with offenders on an individual and professional level while maintaining and reinforcing appropriate professional boundaries to promote and accomplish DOC goals."¹⁵ The hearing officer determined that the grievant violated these sections of the policy: having his face covered entirely by the mask, and using it to entertain the inmates, did not present a professional appearance and demeanor within appropriate boundaries when interacting with the inmates. We perceive no error in the hearing officer's conclusion that the grievant's behavior, as described in the hearing decision, violated agency policy in this regard, warranting a Group II Written Notice.¹⁶

To the extent that the grievant contends that the true charge against him was "being racist," EDR perceives nothing in the record that would require the agency to prove misconduct of that nature. The Written Notice describes the grievant's conduct as "inappropriate, unnecessary" and potentially "derogatory and demeaning," in violation of OP 135.2.¹⁷ This reasoning for discipline is consistent with its witness testimony presented during the hearing.¹⁸ Because evidence in the record supports the hearing officer's determination that the grievant engaged in unprofessional conduct as charged, and in violation of agency policy, EDR will not disturb the hearing decision on this basis.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ Hearing Decision at 2. The grievant does not appear to dispute the hearing officer's factual description of his conduct. See Hearing Recording at 1:29:15-1:29:55.

¹⁵ Agency Exs. at 44-45.

¹⁶ See DHRM Policy 1.60, *Standards of Conduct, Attachment A: Examples of Offenses Grouped by Level* (identifying violations of policy as appropriately classified at the Group II level).

¹⁷ Agency Ex. 1.

¹⁸ See, e.g., Hearing Recording at 1:03:40-1:13:45 (warden's testimony).

Grievant's Inability to Call Witnesses

The grievant also contends that his hearing was unfair because he was not able to call inmates who had given witness statements to the agency describing the grievant's misconduct. However, EDR cannot conclude that the grievant's inability to call inmate witnesses unfairly impacted his hearing.

At the hearing, the agency offered certain inmates' statements as evidence in support of its case. However, because the agency did not make those inmates available to testify,¹⁹ the hearing officer decided to only "consider that an inmate complained but not the details of the complaint or statements of the other inmates."²⁰ Moreover, the hearing decision specifically discounted the statement of Inmate J, who, according to the agency, claimed to have heard the grievant make a racist remark while wearing the white mask.²¹ Even if Inmate J's statement influenced the agency's decision, the hearing officer made clear that he "did not give any weight to Inmate J's statements."²²

Because there is no indication that the hearing officer accorded significant evidentiary weight to written statements by inmates who did not testify, it does not appear that their absence from the hearing had an impact on the hearing officer's analysis or in any way rendered the proceedings unfair. Therefore, EDR will not disturb the decision on this ground.

Excessive Discipline

Finally, the grievant argues that his actions, which he characterizes as essentially a "dress code violation," did not warrant a Group II Written Notice with removal. Under DHRM Policy 1.60, *Standards of Conduct*, Group II offenses are generally appropriate for violations of policy and "include acts . . . of a more serious . . . nature"²³ Therefore, discharge is the "typical" result of an accumulation of two Group II Written Notices.²⁴

In this case, the hearing officer noted that the grievant "had prior active disciplinary action" – a Group II Written Notice with suspension, effective May 13, 2021.²⁵ The hearing officer ultimately found that the agency's issuance of a Group II Written Notice was warranted because the grievant violated the agency's OP 135.2 when he utilized his mask in an unprofessional manner.²⁶ In light of the grievant's prior active Group II Written Notice, the hearing officer found that the agency's decision to terminate the grievant's employment due to accumulation of discipline was warranted. While the grievant argues that a termination due to "a dress code

¹⁹ Hearing Decision at 3 n.1; *see generally Rules for Conducting Grievance Hearings* § IV(E) (There is no law or policy that requires the agency to produce [an] individual [in the physical custody of the state] to testify as a witness.").

²⁰ Hearing Decision at 3 n.1.

²¹ *See* Hearing Recording at 41:53 – 43:18 (investigator's testimony).

²² Hearing Decision at 4.

²³ DHRM Policy 1.60, *Standards of Conduct*, at 8.

²⁴ DHRM Policy 1.60, *Standards of Conduct, Attachment A: Examples of Offenses Grouped by Level*, at 2.

²⁵ Hearing Decision at 2; *see* Agency Ex. 3.

²⁶ Hearing Decision at 3.

violation” is harsh, nothing suggests that this result was inconsistent with policy under the circumstances.²⁷ The hearing decision indicates that the grievant was removed from employment due to the accumulation of two Group II Written Notices, not for simply violating the dress code.²⁸

In sum, the hearing officer relied on evidence in the record to determine that the agency’s disciplinary choices were within policy limits. Accordingly, EDR cannot find that his analysis was erroneous, unreasonable, or otherwise inconsistent with the grievance procedure.

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.²⁹ 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.³⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³¹

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²⁷ Request for Administrative Review at 3.

²⁸ Hearing Decision at 4.

²⁹ *Grievance Procedure Manual* § 7.2(d).

³⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³¹ *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).