



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5563
July 18, 2023

The 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 11868. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11868, 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 began working for the Agency on November 10, 2015. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had worked as a yard officer for the past three or four years. In November 2021, the Agency operated under COVID19 restrictions designed to restrict inmate movement throughout the Facility. Inmates did not attend school and the Facility did not “pull chow.” Facility managers decided to “pull rec” one pod at a time for one hour. Once this was over, Grievant had no duties to perform other than escorting kitchen workers. This meant Grievant did not have to do any work unless there was an emergency.

Grievant and Officer 1 did not know one another until Officer 1 began working at the Facility. Grievant and Officer 1 had been working on the same shift for approximately two or three years.

Grievant and Officer 1 became friends on Facebook and remained connected until Officer 1 was informed they remained Facebook friends. Officer 1 then unfriended Grievant in October 2022. Grievant and Officer 1 did not speak privately outside of work. Grievant had never asked Officer 1 on a date.

¹ Decision of Hearing Officer, Case No. 11868 (“Hearing Decision”), May 9, 2023, at 2-4 (footnotes omitted).

Grievant and Officer 1 had a good working relationship, but they were not personal friends. Officer 1 would sometimes talk about her boyfriend. Grievant and other officers were trying to get Officer 1 to leave the boyfriend because they believed he was abusing her. Grievant did not like Officer 1's boyfriend. The "final straw" was when Grievant and other employees appeared respectfully dressed in their blue uniforms at a funeral for a corrections officer. Officer 1's boyfriend appeared inappropriately dressed in gray with mud on his boots.

Officer 1 worked as a Control Room Officer on November 26, 2021. Inside the Control Room was a panel with switches. Officer 1 was responsible for using the switches on the panel to open and close doors throughout the housing unit when requested to do so by a corrections officer or supervisor. The Control Room was on a higher level than the floor below and had a large window enabling the Control Room Officer to look out into the pod. Officer 1 had access to two working radios inside the Control Room. The control panel also had a panic button that Officer 1 could push if necessary.

Officer 1 had been trained to deal with extreme violence and taught how to disable a male. Officer 1 had been trained regarding the Prison Rape Elimination Act.

On November 26, 2021, Officer 1 was working in the B Building Control Room. At some point, Officer 1 asked Grievant to come talk to her around 4 p.m. Grievant did not have any duties at that time so he left the Yard. Officer 1 had to open three doors to let Grievant come from the outside into the Control Room. At approximately 4:13 p.m., Officer 1 pushed a button that opened the door to allow Grievant to enter the B Building Control Room. Only Grievant and Officer 1 were inside the B Building Control Room.

Grievant and Officer 1 spoke about their shift, the supervisors, incidents with inmates. Officer 1 also spoke about her boyfriend. Officer 1 talked about being depressed because an officer they knew had died by suicide approximately two weeks earlier.

While Grievant was in the Control Room, Officer 1 continued to push buttons on the control panel as needed to open and close doors throughout the pods and areas within her responsibility.

Grievant exited the B Building Control Room at approximately 4:52 p.m.

Officer 1 was responsible for making entries in the Control Room Log book. On November 26, 2021, at 6 a.m., Officer 1 wrote, "All equipment present, secure, and working." At 12:45 p.m., Officer 1 wrote, "[Officer 1] on Post." At 3:30 p.m., Officer 1 wrote, "Lockdown" and then she wrote "Begin Feeding." At 4:30 p.m., Officer 1 wrote, "Feeding complete. Cleaning disinfecting per COVID protocols." Officer 1 did not record Grievant's entry or exit of the Control Room.

On December 7, 2021, the Watch Commander instructed Grievant and another officer to go to an inmate's cell and take the inmate to the restricted housing unit because the inmate was exposing himself to staff. The inmate began fighting Grievant and the other corrections officer. The Inmate had a shank (a knife). Officer 1's radio was working that day. Officer 1 testified at trial that there were two radios in the Control Room that were operational at all times. Officer 1 shut the inmate's cell door. Grievant and the other officer were locked inside the cell with the inmate who was fighting them. Officer 1's error placed Grievant in danger. Grievant was "highly upset" by Officer 1's mistake.

On December 10, 2021, Grievant spoke with Officer 1 and told her she had screwed up and there was nothing he could do to cover for her and that she could lose her job. Grievant did not act inappropriately towards Officer 1 on December 10, 2021.

Officer 1 testified at the criminal trial, "I was in fear for my job" regarding her actions on December 7, 2021. She testified at trial, "I was afraid of losing my job."

On December 12, 2021, Grievant was placed on pre-disciplinary leave.

On April 22, 2022, a local Grand Jury indicted Grievant of a felony, Rape by Force or Threat, and two misdemeanor offenses of Sexual Battery.

On June 1, 2022, Grievant met with the Warden and HRO. Grievant stated, "I'm innocent of all these allegations. I've not been convicted."

On June 28, 2022, Grievant filed a grievance and stated, "I have not been found guilty of anything and am innocent of charges."

On October 19, 2022 through October 21, 2022, Grievant was a defendant in a criminal trial before a jury in the local County Circuit Court. Officer 1 testified and Grievant testified. Grievant testified he did not rape Officer 1. The jury acquitted Grievant off all charges. Grievant initiated procedures to have the indictments expunged but at the time of the grievance hearing that procedure had not been completed.

The agency issued to the grievant a Group III Written Notice with removal on June 12, 2022 for violating agency operating procedures 135.1 (Standards of Conduct), 145.3 (Equal Employment Opportunity, Anti-Harassment, and Workplace Civility), and 135.3 (Workplace Violence), with reference to the agency's investigation and the indictment of the grievant for three criminal charges of rape and sexual assault.² The grievant timely grieved the disciplinary action, and a hearing was held on March 1 and 2, 2023.³ In a decision dated May 9, 2023, the hearing

² Hearing Decision at 1; Agency Exs. at 3-6. In this ruling, we will be referring to "criminal charges" against the grievant and considering them to be the same as the criminal indictments. For purposes of this ruling, there is no functional difference between "criminal charges" and an indictment.

³ See Hearing Decision at 1.

officer determined that the agency did not present sufficient evidence to support the Group III Written Notice with removal.⁴ Thus, the hearing officer ordered that the grievant must be reinstated with back pay, and that the disciplinary action must be rescinded.⁵ The agency now appeals the 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.

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 the 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 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.

Discipline on the Basis of Criminal Charges

The agency asserts in its appeal that the hearing officer failed to consider facts regarding the criminal charges against the grievant as a basis for disciplinary action and improperly utilized DHRM Policy 1.60, *Standards of Conduct*, to assess this issue. The agency argues that the fact that the grievant was criminally charged with crimes against a person supports the disciplinary action alone. The hearing officer addressed this claim, finding that it was not supported by state policy.¹³ EDR has no basis to dispute the hearing officer’s assessment of this issue.

⁴ *Id.* at 5-6.

⁵ *Id.* at 7.

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 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.

¹³ Hearing Decision at 6.

State policy, as well as the agency's policy, recognizes that the presence of an employee who is the subject of criminal charges can negatively impact the workplace.¹⁴ State policy's answer to this issue is to provide for removal from the workplace without pay for up to 90 days.¹⁵ An agency can move forward with disciplinary action if there is a basis to do so, but such a disciplinary action would be based on evidence the agency can present about underlying misconduct, not solely that the misconduct resulted in a criminal charge.¹⁶ Although the agency's policy could be interpreted to allow for discipline for a criminal charge,¹⁷ nothing in state policy provides for discipline on the basis of a criminal charge alone.¹⁸ The risks of pursuing such a disciplinary action are exemplified by this case. Here, the grievant was terminated because he was criminally charged, but was ultimately acquitted. Had the grievant been convicted, the agency would not necessarily have to prove the underlying misconduct, but could rather issue disciplinary action on the basis of the criminal conviction.¹⁹ Thus, it is unclear how an unsupported criminal charge results in a sufficient basis under state policy to support disciplinary action.²⁰ Accordingly, we have no basis to find that the hearing officer's determination is in error.

Factual Arguments

The agency has also made assertions about the hearing officer's factual findings. The agency raises few arguments to contest the hearing officer's determination that the agency did not meet its burden of proof to establish that the grievant engaged in the underlying conduct of rape and sexual assault. Indeed, many of the agency's arguments suggest that the hearing officer made findings about issues that were irrelevant because the agency's disciplinary action was based on the criminal charges themselves, not the grievant's underlying misconduct.²¹ As this issue has been addressed above, we turn to the other factual arguments.

The agency asserts that the hearing officer "disregarded uncontradicted, relevant testimony, including the testimony of an expert witness who provided information based upon her training and experience about how victims of trauma, such as rape and sexual assault might interact with their abuser after the rape and/or sexual assault." This argument concerns the agency's witness who testified about how victims generally respond following an assault. The witness did not provide any testimony about Officer 1 specifically or the underlying conduct alleged in this

¹⁴ DHRM Policy 1.60, *Standards of Conduct*, at 11-12 (Agency Exs. at 176-77). Note: The version of the Standards of Conduct policy applicable to the facts of this case is the version that was revised June 1, 2011.

¹⁵ *Id.* Agencies may continue to keep an employee out of the workplace beyond 90 days, but the suspension is with pay at that point. *Id.*

¹⁶ "Regardless of the status of any criminal investigation or process, the agency may determine at any time to institute disciplinary charges against the employee under the Standards of Conduct, up to and including termination, *based upon the facts or evidence of conduct that prompted the criminal investigation or process.* *Id.* at 12 (emphasis added).

¹⁷ See Agency Exs. at 143-44, 150. Agencies are only authorized to develop human resources policies that do not conflict with state policies or procedures. DHRM Policy 1.01, *Introduction*, at 2-3. Where discipline is issued pursuant to an agency policy provision that is in conflict with state policy or procedure, the discipline would not be consistent with state policy and, therefore, appropriately rescinded. See *Rules for Conducting Grievance Hearings* § VI(B).

¹⁸ EDR has confirmed this interpretation of policy with DHRM's Policy Administration team.

¹⁹ See DHRM Policy 1.60, *Standards of Conduct*, Attach. A.

²⁰ State policy provides that "if the charge is resolved without the employee being convicted of it, the employer shall return the employee to active status." DHRM Policy 1.60, *Standards of Conduct* (2011), at 12.

²¹ The warden testified that the Written Notice was issued because the grievant was criminally charged, not because of the underlying misconduct of rape and sexual assault. Hearing Recording, Day 2, at 1:43:20-1:44:00, 1:44:42-1:46:24.

case. Therefore, the expert witness was essentially offered to provide further support to the credibility of Officer 1's testimony.²²

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. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.²³ Although the hearing officer could have included discussion as to this expert witness's testimony and the effect, or not, on his credibility determinations of Officer 1, he was not required to do so here. Accordingly, EDR cannot substitute its own judgment for that reflected in the hearing decision; we perceive no reversible error in the hearing officer's analysis of these factual issues.

The agency also argues that the hearing officer disregarded testimony from the Warden "outlining his concerns about the safety of continuing to employ someone in an institution where there were individuals incarcerated for the same acts of which Grievant was accused." The Warden additionally testified about his concerns for the grievant's safety, ongoing low morale at the facility, and division among the facility staff about the allegations against the grievant. The Warden's testimony would clearly support an agency's determination to remove the grievant from the workplace temporarily while criminal charges are pending, pursuant to policy.²⁴ However, as addressed above, termination for the criminal charges alone is not consistent with state policy. While the Warden's testimony is explanatory, it does not appear material to the disciplinary action issued for misconduct other than criminal charges. Therefore, we cannot find reversible error with regard to the hearing officer's consideration or lack of discussion of the above factual matter.

The AHO Improperly Permitted the Criminal Case To Be Retried As Part of the Administrative Hearing and Held the Agency to An Incorrect Standard of Proof.

The agency appears to argue that the hearing officer erred by requiring the agency to prove that the grievant had committed the rape and sexual assault. While the agency appears to state that the basis for the disciplinary action in this case was the criminal charges against the grievant, both the Written Notice²⁵ and the agency's evidence at hearing appear to have addressed whether the grievant engaged in the underlying conduct of rape and sexual assault. As such, it is not surprising that the hearing officer assessed the facts to determine whether the agency had met its burden of proof to establish this underlying conduct. While the agency argues that the hearing officer permitted the criminal case to be retried, we do not agree with that assessment. The hearing officer appears to have considered the evidence put forward as to an allegation that the grievant engaged in the misconduct of rape and/or sexual assault. While the agency argues the hearing officer held

²² If the agency's position is that the grievant was truly only disciplined because he was criminally charged, it is unclear why this witness's testimony was necessary, or why the testimony of Officer 1 was material either. Such testimony would only appear to be relevant to the issue of whether the grievant engaged in the underlying misconduct of rape and sexual assault.

²³ See, e.g., EDR Ruling No. 2020-4976.

²⁴ DOC Op Proc. 135.1 § V(B) (Agency Exs. at 142-43).

²⁵ Agency Exs. at 3-6.

them to an incorrect standard of proof, EDR has no basis to find that the agency's argument is supported by the record.²⁶

Inadmissible Evidence

The agency argues that the hearing officer improperly allowed the admission of the training record of Officer 1 into the hearing record. The agency argues that this result contravened an earlier EDR ruling on the matter. However, EDR's ruling was whether the agency was required to produce Officer 1's training record.²⁷ In the ruling, EDR found that there was just cause for the agency to withhold the documentation.²⁸ EDR's ruling did not prohibit the hearing officer from admitting the information into the record.²⁹ Thus, the hearing officer did not fail to adhere to EDR's prior ruling. EDR cannot find that the hearing officer's determination was an abuse of discretion or that this evidence had any material impact on the outcome of the hearing such that remand would be warranted.

Grievant's Objection

In a response to the agency's appeal brief, the grievant objects to the agency's advocate from "participating in any manner that is not authorized since she is an employee of the VDOC and has only limited authority to act in these grievance matters." The grievant argues that the agency's advocate's representation is "limited to the examination of witnesses at administrative hearings relating to personnel matters and the adoption of agency standards, policies, rules and regulations," citing to Virginia Code Section 54.1-3900. EDR has considered and rejected a similar objection in another grievance matter.³⁰ For the reasons described in that ruling, EDR declines to sustain the grievant's objection.

Attorney's Fees

In the grievant's May 25, 2023 and June 12, 2023 letters to EDR, responding to the agency's request for administrative review and supplemental brief respectively, the grievant requested 14 days from receipt of this ruling to submit a request for attorney's fees. It is unclear whether this request was directed to EDR or the hearing officer. However, the hearing officer no longer has jurisdiction to consider the request at this time. Section 7.2(e) of the *Grievance Procedure Manual* states that "counsel for the grievant shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the initial decision ordering reinstatement, counsel's petition for reasonable attorneys' fees." To date, no such petition for attorney's fees has been submitted to the hearing officer or EDR. Furthermore, by operation of Section 7.2(d) of the *Grievance Procedure Manual*, the hearing decision becomes final with the issuance of this ruling without remand. Because no timely request for attorney's fees has been received, Section 7.2(d) provides that the hearing decision is now final.³¹ The hearing officer no longer has jurisdiction to

²⁶ See Hearing Decision at 2 (describing the burden of proof as preponderance of the evidence).

²⁷ EDR Ruling No. 2023-5495 at 3.

²⁸ *Id.* The grievant appears to have obtained the training record through other means.

²⁹ *Id.*

³⁰ EDR Ruling No. 2023-5541.

³¹ Without a timely petition for attorney's fees, the provisions of Section 7.2(e) regarding the finality of the hearing decision do not come into operation.

issue a fees addendum. Accordingly, the grievant's request for an extension of time, which was submitted after the attorney fees petition was due, is denied.

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.³² 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.³³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁴

Christopher M. Grab
Director
Office of Employment Dispute Resolution

³² *Grievance Procedure Manual* § 7.2(d).

³³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).