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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2024-5615
October 11, 2023

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11913, which addresses a grievance with the Department of Corrections (the “agency”). For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11913, as found by the hearing officer, are as follows:¹

During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency in a Level 3 secure Facility as a Correctional Officer (“C/O”), safeguarding inmates and other Facility personnel in, amongst other places, the Facility’s Restorative Housing Unit (“RHU”).

The RHU houses inmates who must be safeguarded by C/Os with especial vigilance, having been removed from the general population because of problematic issues such as being on suicide watch, facing disciplinary charges, etc.

The Grievant was required to be vigilant and alert while on post of the floor of the SHU during his whole shift on the night of August 29, 2022 into the morning of August 30, 2022. The Grievant’s supervisor reminded the Grievant at approximately 0150 hours “that there is a 15 Minute special watch in RHU, that he has missed several rounds, and that he will be written up for it.”

Instead, between 2349 hours on August 29, 2022, and 0150 hours on August 30, 2022, the Grievant fell asleep on multiple occasions. The Grievant also did not make all his required rounds.

¹ Decision of Hearing Officer, Case No. 11913 (“Hearing Decision”), August 21, 2023, at 15-17 (internal and external citations omitted).

The Grievant performed a vital function for the Facility as a C/O with significant and substantial training invested in the Grievant by the Agency in all aspects of his employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all his duties.

The Facility is a high security Level 3 institution and the Grievant's role in maintaining the safety and security of inmates, staff and the public is paramount, particularly when the Grievant was assigned to the RHU.

Accordingly, efficacious performance of Grievant's work is critical for the orderly and efficient functioning of the Agency, especially as regards Grievant's duties pertaining to the RHU.

On November 2, 2022, the agency issued to the grievant a Group III Written Notice with removal for sleeping during working hours in violation of the agency's Operating Procedure 135.1.² In the Written Notice, the agency cited three offense codes: unsatisfactory performance, failure to follow instructions and/or policy, and sleeping during work hours.³ Pursuant to this Written Notice, on October 31, 2022, the grievant's employment was effectively terminated.⁴

The grievant timely grieved the disciplinary action and a grievance hearing occurred on August 17, 2023.⁵ In a decision dated August 21, 2023, the hearing officer determined that the Group III Written Notice with termination should be upheld and that no mitigating circumstances existed to reduce the agency's discipline.⁶

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."⁷ 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.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing

² Agency Ex. 1; *see* Hearing Decision at 2.

³ Agency Ex. 1.

⁴ Hearing Decision at 2.

⁵ *Id.* Due to multiple motions for continuances, document production issues, motions for complete relief, and motions to disqualify the agency's advocate -- one of which resulted in an EDR Compliance Ruling (*see* EDR Ruling No. 2023-5541) -- the hearing was delayed for several months after the issuance of the Written Notice. Because EDR prioritizes the merits of cases when issuing rulings, and because the grievant has not brought any procedural issues in his request for administrative review, EDR will omit any discussion of these past procedural issues for the purposes of this ruling. *See* Hearing Decision at 3-15 for the hearing officer's recounting of this case's procedural history.

⁶ *Id.* at 20-24.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant appeals the hearing officer's decision primarily based on the hearing officer's consideration of the evidence and his findings of fact. Specifically, the grievant alleges that the hearing officer violated Virginia Code and DHRM Policy by considering and upholding offenses that the agency did not explicitly charge the grievant with, which the grievant argues is in violation of Va. Code § 2.2-3005(C)(6). The grievant also alleges that the hearing officer violated Va. Code § 2.2-3005.1(C) by offering "no basis for his findings of fact and in doing so, abdicated his duties."

Hearing Officer's Consideration of Charges

The grievant first alleges that the hearing officer violated Va. Code § 2.2-3005(C)(6) by adding three additional violations of the agency's Operating Procedures of which the agency did not notate in the Written Notice. Specifically, he alleges that pursuant to § 2.2-3005(C)(6), a hearing officer can only receive and consider evidence "of any offense charged by an agency," and the hearing officer violated this by adding two violations of DOC Operating Procedure 135.1 and one violation of 135.2.

Referring to the Va. Code provision that the grievant highlights, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."¹⁰ While the grievant appears to rely on this provision to support his claims that the hearing officer considered evidence of conduct not charged in the Written Notice, this provision is actually addressing the hearing officer's authority to mitigate in disciplinary cases. As such, the language does not support the grievant's allegation here. However, we interpret the grievant's argument more generally to allege that the hearing officer upheld misconduct never charged against the grievant. Although the grievant does not cite to a particular provision of DHRM policy, the *Rules for Conducting Grievance Hearings* ("Rules") provide that "a hearing officer's review is limited to the conduct charged in the Written Notice and attachments."¹¹ More specifically, in disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹²

Here, the agency issued a single Group III Written Notice that clearly articulated the misconduct charged (sleeping during work hours) and the factual circumstances of the misconduct. The Written Notice further cited three different offense codes: (1) unsatisfactory performance, (2) failure to follow instructions and/or policy, and (3) sleeping during work hours.¹³ The agency cited

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Va. Code § 2.2-3005(C)(6).

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Id.* § VI(B).

¹³ Agency Ex. 1.

Operating Procedure 135.1, *Standards of Conduct*, as the policy the grievant violated.¹⁴ In determining that the grievant engaged in the misconduct charged (sleeping during work hours),¹⁵ the hearing officer found that the grievant violated three provisions of Operating Procedure 135.1, Section XIV: (1) violating safety rules where there is a threat of physical harm, (2) sleeping during working hours, and (3) violation of Operating Procedure 135.2.¹⁶ The hearing officer also found that the grievant violated a provision in Operating Procedure 135.2, titled as “Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of DOC operating procedures.”¹⁷

Based upon EDR’s review of the Written Notice and the hearing officer’s decision, it cannot be said that the hearing officer upheld misconduct not charged. The grievant was very clearly disciplined for sleeping during work hours, and that is the misconduct on which the hearing officer based his decision.¹⁸ While the grievant appears to argue that the hearing officer’s reliance on a policy not listed on the Written Notice is improper, there is no provision of DHRM Policy 1.60, *Standards of Conduct*, that requires each and every policy or portion thereof violated to be listed.¹⁹ Furthermore, had the hearing officer not relied on Operating Procedure 135.2, there remains sufficient grounds in the decision to support the issuance of a Group III Written Notice with termination.²⁰ For the foregoing reasons, EDR declines to disturb the hearing decision on these grounds.

Findings of Fact

The grievant also alleges on appeal that the hearing officer violated Va. Code § 2.2-3005.1(C) by not offering a basis for his findings of fact. The cited Va. Code provision states that the hearing officer’s decision must “contain findings of fact as to the material issues in the case and the basis for those findings.”²¹ The grievance procedure includes a similar provision, requiring hearing decisions to contain “findings of fact on the material issues and the grounds in the record for those findings.”²² 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.²³ Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the

¹⁴ *Id.*

¹⁵ Hearing Decision at 16-17.

¹⁶ *Id.* at 19.

¹⁷ *Id.*

¹⁸ *Id.* at 16-20.

¹⁹ There could be the potential for a failure to list a specific policy violated on the Written Notice to rise to a due process concern, such as where a disciplinary charge is so unclear as to its basis. However, nothing about the facts of this case or the Written Notice issued approaches such a concern. Further, absent evidence to the contrary, “an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee.” *Rules for Conducting Grievance Hearings* § VI(B)(2) n.25. EDR has reviewed no evidence to suggest the grievant was unaware that sleeping during work hours was a violation of state and agency policies.

²⁰ *See id.* at 19-20.

²¹ Va. Code § 2.2-3005.1(C).

²² *Grievance Procedure Manual* § 5.9.

²³ *Rules for Conducting Grievance Hearings* § VI(B).

evidence that the action taken was both warranted and appropriate under all the facts and circumstances.²⁴ 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.

While the grievant disputes the hearing decision for allegedly not including the basis for the hearing officer's findings, the grievant has also not pointed to any particular portion of the findings of fact that is inaccurate. EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer's determination that the grievant engaged in the behavior charged on the Written Notice, that his behavior constituted misconduct, and that the discipline was consistent with law and policy. 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.²⁵ Because the hearing officer's findings in this case 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. Accordingly, EDR declines to disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is insufficient record evidence to support the grievant's assertions and, accordingly, that EDR has no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

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.²⁶ 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.²⁷ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁸

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²⁴ *Grievance Procedure Manual* § 5.8.

²⁵ See, e.g., EDR Ruling No. 2014-3884.

²⁶ *Grievance Procedure Manual* § 7.2(d).

²⁷ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁸ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).