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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5631
December 4, 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 11967. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11967, as found by the hearing officer, are as follows:

> The grievant is a corrections officer having many years of experience with the agency at multiple facilities. He has been a good employee, receiving several ratings of "exceeds contributor." From his beginning position he has received promotions and at the relevant times to this proceeding held the rank of Lieutenant. On November 10, 2022, he requested a transfer from the facility to which he was then assigned (Facility A). This request was made because of his belief that his opportunities for further promotion within the agency were minimal at Facility A. He based this belief on the presence of higher-ranking officers who were unlikely to leave the agency or facility in the foreseeable future. His ambition to rise through the ranks caused him to see a transfer as being the best avenue to fulfill his goal.
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> The transfer to a different facility (Facility B) was approved, effective as of November 25, 2022. The grievant ceased working at Facility A and began his work at Facility B after completing a temporary assignment at a third facility. On December 2, a personnel assistant in the human resource office of Facility A sent an email to all the staff of Facility A notifying them of the transfer by the grievant to Facility B. The email asked the staff to wish him well and praised him for his service to Facility A.
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> On December 6, the grievant sent the following reply email to the personnel assistant and all staff at Facility A:

> Thank you very much for the thoughtful e-mail… [PERSONNEL ASSISTANT]. It's been a blessing to work at [Facility A] the last 5.5 years. I can honestly say I've met lifelong friends and learned more in my short time there than I could have ever imagined. I would never be the rank I am without the help of each and everyone of you; I will be forever indebted to each of you. The decision to lateral was not easy whatsoever. But after much thought and consideration, it was the best decision at the time, given the circumstances. Continue the VISION that has been the cornerstone since (Facility A) is opened…being the "best in the west". It always has been, and always will be…only thanks to the STAFF who give it their all each and every day. It's easy lose focus on the big picture due to the environment we all work in. It's not the INMATES that we need to focus on, it's each other. I'm always just a phone call or email away if you need anything. Find a good STRESS RELIEF that works for you and take care of yourselves and each other; and from the words of my old First Sergeant remember, "we all we got".

Approximately 3 hours after the grievant's reply was sent a former coworker at Facility A sent a reply email to the grievant, with all staff employed at Facility A being recipients of the email as well. The reply from the coworker was "[Grievant], just remember 'in the woods there was a tree'". The reference in the email was to a children's song regularly used by the coworker to reduce tensions and stress. He had sung the song multiple occasions to the grievant when they both worked at Facility A.

This email string raised concern among some unspecified number of employees at Facility A. In particular, the reply by the coworker was seen as possibly as being a racist "dog whistle". The warden at Facility A is a woman of color. She had been at the facility only a few months in December of 2022. Some employees believed that the culture at Facility A was impacted by a "good old' boy network." The grievant was perceived by at least one employee as being part of a clique that was part of the network. No evidence was presented that the tension at Facility A was overtly racial. The demographic of the staff at Facility A was approximately 5 percent being people of color.[1]

On January 5, 2023, the agency issued to the grievant a Group II Written Notice with a 10-workday suspension, citing disruptive behavior and violation of DHRM Policy 2.35, *Civility in the Workplace*.[2] The grievant timely grieved the discipline and a hearing was held on September 20, 2023.[3] In a decision dated October 2, 2023, the hearing officer concluded that the agency had not presented sufficient evidence to prove violation of any policy at the level of a Group II Written

[1] Decision of Hearing Officer, Case No. 11967 ("Hearing Decision"), Oct. 2, 2023, at 2-3.
[2] Agency Exs. at 1-3; *see* Hearing Decision at 1.
[3] *See id.* at 1.

Notice, but that the evidence was sufficient to support discipline at the Group I level.[4] Accordingly, the hearing officer reduced the disciplinary action to a Group I Written Notice, with restoration of any lost pay during suspension.[5] The agency now appeals the hearing decision to EDR.[6]

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

In its request for administrative review, the agency argues that, in reducing the level of discipline imposed, the hearing officer erred by "disregard[ing] his own Findings of Facts" and by "substitut[ing] his judgement of the appropriate discipline for that of the Agency."

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 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

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[4] *Id.* at 7-8.
[5] *Id.* at 8.
[6] The grievant has submitted his own request to EDR that he "be completely exonerated" because "the Hearings Officer's decision does not comport with policy." However, EDR received this request on October 25, 2023. Requests for administrative review of a hearing officer's decision must be received by EDR within 15 calendar days of the issue date of the decision. *Grievance Procedure Manual* § 7.2(a). The opposing party may then submit a rebuttal to be received by EDR within 10 calendar days of the end of the appeal period. *Id.* Here, because the hearing decision was issued on October 2, 2023, any requests for administrative review must have been received by this Office by October 17, 2023, and any rebuttals must have been received by October 27, 2023. Accordingly, this ruling is issued in consideration of the grievant's October 25 submission to the extent it rebuts the agency's timely request for administrative review, but not to the extent it presents an independent request for administrative review, which would be untimely.
[7] Va. Code §§ 2.2-1202.1(2), (3), (5).
[8] *See Grievance Procedure Manual* § 6.4(3).
[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[10] Va. Code § 2.2-3005.1(C).
[11] *Grievance Procedure Manual* § 5.9.
[12] *Rules for Conducting Grievance Hearings* § VI(B).
[13] *Grievance Procedure Manual* § 5.8.

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.

In his decision, the hearing officer found that the grievant, as a supervisor-level employee, committed misconduct by sending a facility-wide email that could reasonably be perceived to suggest that "inmates were to be treated in an inferior manner."[14] The hearing officer found that this portion of the email was not consistent with the agency's requirements to treat "coworkers, supervisors, managers, subordinates, inmates/probationers/parolees . . . with respect, courtesy, dignity, and professionalism," and for supervisor-level employees to be "especially mindful of how their words and deeds might be perceived or might affect or influence others."[15] However, the hearing officer found that the email content, even in the context of potential racial tension at the facility, did not "create a hostile or offensive environment sufficient to support" a violation of the agency's anti-harassment policy.[16]

The agency appears to contend that the hearing officer's conclusions are not consistent with his findings of fact. The agency points to findings that one or more employees perceived "a 'good old' boy' network" at the facility that included the grievant, and that the other employee's reply to the grievant's email was possibly a "racist 'dog whistle.'"[17] As such, the agency argues that its judgment as to the significance and effect of the grievant's email is entitled to deference. Although EDR agrees with this general principle, an agency at a disciplinary grievance hearing must nevertheless prove misconduct and appropriate discipline by a preponderance of the evidence. In this case, the hearing officer did not find that the evidence supported misconduct, except by the email's implication that employees were more deserving of concern than inmates. The only other portion of the email cited by the Written Notice as inappropriate was: "Continue the VISION that has been the cornerstone of [the facility] since it opened."[18] The hearing officer did not find that this statement, or any other in the email, reasonably suggested any link to racial tension or other divisions at the facility.

In its request for review, the agency points to no evidence that should have supported a "perception of cultural insensitivity" in the grievant's email, as charged in the Written Notice.[19] Moreover, upon a thorough review of the record, EDR is unable to identify any such evidence. The hearing officer acknowledged certain witnesses' testimony that they were confused by capitalized words in the email and, in at least one case, disturbed by the possibility that the "tree" in the other employee's reply was a reference to racist lynching.[20] However, although the hearing officer credited this testimony, he did not find that it presented an objectively reasonable basis to link concerns of racism to the grievant's own email. We find no error in his assessment in this

[14] Hearing Decision at 4.
[15] *Id.* at 4-5 (quoting DOC Operating Procs. 135.1, 135.3).
[16] *Id.* at 7.
[17] *See id.* at 3.
[18] Agency Exs. at 1-2.
[19] *Id.*
[20] *See* Hearing Decision at 3, 6-7.

regard. Conclusions as to the weight of witness 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 such evidence and rendering factual findings is squarely within the hearing officer's authority, and nothing in the record suggests that the hearing officer disregarded agency evidence or otherwise abused his discretion.

Accordingly, the issue of appropriate discipline is assessed solely with regard to the grievant's email statement about inmates, and whether the hearing officer erred in finding that this statement merited discipline only at the Group I level. Group I offenses "generally have a minor impact on agency business operations" and include conduct such as "obscene or disrespectful language."[21] By contrast, Group II offenses "significantly impact the agency's services and operations."[22] The hearing decision included no findings that the grievant's statement about inmates had a particular effect on agency operations, and the agency points to no evidence that should have supported such findings. However, the hearing officer essentially found that this statement could reasonably be interpreted as disrespectful toward inmates in the agency's custody. As such, we cannot conclude that the hearing officer abused his discretion in finding that the evidence supported discipline only at the Group I level, or that his decision otherwise failed to comply 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.[23] 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.[24] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[25]

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[21] DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped by Level."
[22] *Id.*
[23] *Grievance Procedure Manual* § 7.2(d).
[24] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[25] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).