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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4906
April 22, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 11291. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11291, as found by the hearing officer, are as follows:²

The Department of Corrections employs Grievant as a Lieutenant at one of its Facilities. He began working for the Agency in June 2006. No evidence of prior active disciplinary action was introduced during the hearing.

The Inmate decided to make himself ill so that he would be taken to the Hospital where he would attempt to escape. Security staff were alerted when the Inmate was found lying on the floor in the bathroom shower at approximately 7:12 a.m. on May 10, 2018. Officer W responded to the shower. A nurse told Officer W that she believed the Inmate was having a minor heart attack. Medical and security staff rendered medical assistance to the Inmate. The LPN notified Grievant that there were several pills found on the floor next to the Inmate. At approximately 7:16 a.m., the Inmate was taken by stretcher to the Medical Unit inside the Facility. The Doctor examined the Inmate. The Doctor stabilized the Inmate. The Inmate was alert and communicating with the Doctor but not with words or sentences. When the Doctor asked the Inmate to smile or stick out his tongue, the Inmate complied. The Inmate complained that his back and neck hurt.

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Decision of Hearing Officer, Case No. 11291 (“Hearing Decision”), Mar. 25, 2019, at 2-4.

The Doctor concluded the Inmate should be taken to the Hospital. The Inmate remained in the Medical Unit for approximately a half hour before an ambulance was requested.

The Doctor testified that inherent in calling for an ambulance is the conclusion that this was an emergency. If the Inmate was not in an emergency situation, the Inmate would have been transported using a DOC transportation van. The Doctor considered an emergency to be transportation by ambulance to a hospital while receiving direct care supervision.

Grievant was the Operations Supervisor responsible for supervising transport of the Inmate from the Medical Unit to the Hospital. Grievant was responsible for ensuring that restraints were applied properly on the Inmate and search procedures were followed prior to the Inmate leaving the Facility.

Grievant enlisted Officer W and Officer B to serve as transportation officers. The Inmate was placed in the ambulance. The Inmate was wearing jeans pants and a shirt. Grievant instructed Officer W to get inside the ambulance and check the Inmate's Flex Cuffs to determine if they were secure. Grievant did a "quick visual search" of the Inmate at the Sally Port as the Inmate laid on the stretcher in the ambulance. Officer W got into the vehicle and verified that the Inmate's Flex Cuffs and leg irons were secure. Officer W looked at Grievant to see if Grievant wanted Officer W to search the Inmate or remove his jeans. Grievant told Officer W that the Inmate was "good to go" to indicate to Officer W that no further action was necessary. Officer W did not search the Inmate based on Grievant's instruction. If Officer W had searched the Inmate, it would have involved removal and inspection of the Inmate's jeans pants.

Officer W rode in the ambulance with the Inmate. Officer B drove a transportation van behind the ambulance. After arriving at the Hospital, neither Officer B, nor Officer W searched the Inmate. The Inmate was transported from the Hospital by Med Flight Helicopter to Hospital 2. Officer W accompanied the Inmate in the helicopter to Hospital 2. Officer B drove the transportation van to Hospital 2.

Upon arriving at Hospital 2, the Inmate was taken to the Cardiac Care Unit on the tenth floor. Officer W and Officer B supervised the Inmate while he was in Hospital 2. The Hospital Doctor decided the Inmate needed a CAT scan. The Hospital Nurse told Officer W and Officer B that the Inmate's jeans had to be removed to place the Inmate in a hospital gown for the CAT scan. The Inmate heard this and removed three "shanks" from his jeans and placed them in the hospital bed linen without being observed. Officer W removed and searched the Inmate's jeans and placed them in a patient property bag. The Inmate's handcuffs had to be removed during the CAT scan but his leg irons remained secured.

After the Inmate returned to his room from the CAT scan, the Inmate told medical staff he needed an MRI because his neck and back hurt. The Inmate planned to take the shanks from his bed linen and carry out his plan of escape

when he would not be in handcuffs or leg irons during the MRI. The Hospital Doctor told the Inmate he did not need an MRI. This changed the Inmate's plans for escape.

On May 11, 2018, the Inmate was discharged from the Cardiac Care Unit to another Unit. After the Inmate left his room in Hospital 2, Ms. L began to remove the bed linen and found the three shanks. Upon being notified that the shanks were found in the Inmate's bed linen, the Sergeant strip searched the Inmate. A letter written by the Inmate was discovered during the search. The letter outlined the Inmate's plan of escape.

On or about June 21, 2018, the grievant was issued a Group III Written Notice with a five workday suspension for failing to ensure an offender was searched prior to leaving the Facility.³ The grievant timely grieved the disciplinary action and a hearing was held on March 5, 2019.⁴ In a decision dated March 25, 2019, the hearing officer determined that the agency had presented sufficient evidence to support the disciplinary action and upheld the issuance of the Group III Written Notice and the suspension.⁵ The grievant now appeals the hearing decision to EDR.

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."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 Officer's Consideration of Evidence

In his request for administrative review, the grievant argues that the hearing officer erred in upholding the Written Notice because the medical emergency of the Inmate permitted waiving the required search in this instance.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

³ *Id.* at 1. The Hearing Decision notes that this date was June 21, 2019, which appears to be a clerical error. *Id.*

⁴ *See id.*

⁵ *Id.* at 1, 4-6.

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 In his request for administrative review, the grievant also asserts two other points: one about the hearing officer's factual findings as to how the Inmate removed the shanks from his pants, and one about agency policy regarding the responsibility of transportation staff to properly use restraints. Neither of these points appears to be relevant to the basis for the disciplinary action at issue. Because neither of these matters would have an effect on the outcome of this case, the grievant's assertions about these issues will not be addressed in this ruling.

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

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 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 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.

In the hearing decision, the hearing officer addressed the grievant's claim and found that there was "no reason to believe that searching the Inmate and placing him in an orange jumpsuit would have caused an unnecessary delay."¹⁴ Accordingly, the hearing officer determined that the grievant's medical exception argument, raised again on administrative review, did not justify the grievant's actions in this instance.¹⁵ EDR has reviewed the hearing record and finds there is evidence to support the hearing officer's determination regarding the medical emergency exception asserted by the grievant.¹⁶ Further, the hearing officer made appropriate factual determinations 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.¹⁷ 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.¹⁸

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. 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 decision on this basis.

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

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

¹³ *Grievance Procedure Manual* § 5.8.

¹⁴ Hearing Decision at 5.

¹⁵ *See id.* at 5-6.

¹⁶ *E.g.*, Agency Exhibit 2 at 13; Agency Exhibit 5.

¹⁷ Hearing Decision at 4-6.

¹⁸ *See, e.g.*, EDR Ruling No. 2014-3884.

final hearing decision once all timely requests for administrative review have been decided.¹⁹ 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.²⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²¹



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¹⁹ *Grievance Procedure Manual* § 7.2(d).

²⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²¹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).