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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Numbers 2019-4909, 2019-4911
May 17, 2019

Both the grievant and the agency have requested that the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] administratively review the hearing officer's decision in Case Number 11269. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11269, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for more than six years. No evidence of prior active disciplinary action was introduced during the hearing.
>
> The Facility entered into an agreement with a Vendor for the Vendor to supply food products to inmates through the Facility's commissary. The Vendor supplied a brand of potato chips that inmates thought was especially appealing. The Vendor did not have a contract to supply that brand to the Facility to be placed in vending machines accessible to Agency employees. Employees were not allowed to purchase food from the commissary and, thus, the potato chips were only available to inmates. Employees were not permitted to take or consume food belonging to the inmates.
>
> Ms. E wanted to taste the Vendor's potato chips. The Inmate[3] was aware Ms. E wanted to eat the potato chips. The Inmate used money from his account to

[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. 11269 ("Hearing Decision"), Apr. 3, 2019, at 2-4 (citations omitted).

purchase a bag of potato chips from the commissary with the objective of giving them to Ms. E. Under the Agency's policies, Ms. E was not permitted to request or receive anything from inmates.

On May 4, 2018, the Inmate attempted to give Ms. E the potato chips. He took the chips to the door of the Medical Office and knocked. Officer W was stationed at the Medical Office post. The Inmate told Officer W that he had chips for Ms. E. Officer W told him the Inmate he could not enter the Medical Office. The Inmate left. The Inmate did not mention Grievant's name.

On May 7, 2018, Grievant was working the Medical Office post. The dental unit was part of the Medical Office. His duties included controlling movement of employees and offenders into and out of the medical office.

Ms. E was working in the dental unit. Officer R entered the Medical Office and went to the back of the office near the dental unit.

The Inmate approached the Medical Office door and sought entry. Grievant observed the Inmate and could tell the Inmate had something hidden under his shirt. Grievant asked the Inmate what he thought he was doing. The Inmate said Ms. E had asked him to bring her a bag of chips. Grievant did not know that the Inmate planned to bring a bag of chips to Ms. E before being informed by the Inmate. Grievant wanted to ask Ms. E if she had asked for chips because the Inmate had shown a pattern of telling lies about staff. Grievant failed to "pat down" the Inmate because he was "so wrapped up on asking [Ms. E] if she had asked for chips." Grievant wanted to take the Inmate to Ms. E to ask her if she had asked the Inmate to bring her chips. Grievant thought that Ms. E would say "no" and then Grievant could charge the Inmate for lying about staff.

Officer R and Ms. E were near the dental office. Grievant and the Inmate walked in. Grievant said, "He's got something for you." The Inmate opened his shirt. Officer R heard Grievant's statement and became angry because he recognized that the Inmate's behavior was inappropriate. Officer R grabbed the chips and said, "You ain't supposed to be doing this." Officer R threw the chips on the ground. The Inmate attempted to pick up the chips and said he brought them for Ms. E. Officer R grabbed the bag of chips again, tried to crush the bag causing it to open partially, and said to the Inmate "You can leave." Grievant escorted the Inmate out. The Inmate left the Medical Office at approximately 12:10 p.m. The bag of chips remained in the dental unit.

Grievant and Officer R walked to the front of the office. Officer R told Grievant that, "This does not look good; you need to handle it." Officer R left the office and went to the segregation unit.

At approximately 12:11 p.m., Grievant and Ms. E stood at the front desk talking. At approximately 12:14 p.m., Grievant walked to the dental unit and

[3] [Although the hearing decision refers to the "Inmate," EDR's ruling will refer to this individual as "the offender."]

obtained the bag of chips. It appears he walked back to the dental unit for the sole purpose of obtaining the chips. He returned to the front desk. Grievant pushed the top of the bag open and turned the top of the bag towards Ms. E to offer her chips. Ms. E reached into the bag and took a potato chip. She ate the potato chip. At approximately 12:14:45 p.m., Grievant ate a potato chip. Grievant handed Ms. E the bag and she continued to eat potato chips. She put the bag on the desk as Grievant and Ms. E stood at the desk.

Officer R went to a post in a booth where there was a camera. The camera showed Grievant and Ms. E next to each other eating chips. Grievant ate more than one chip but not all of the chips. Officer R called Grievant and asked what he was doing. Grievant said he was sitting there. Officer R asked are you eating chips? Grievant did not respond.

Approximately ten minutes after Officer R called Grievant, Grievant called Officer R and asked Officer R to come to Grievant's location to sign a confiscation form for the potato chips. Approximately 30 minutes later, Officer R signed the confiscation form even though he knew the potato chip bag had been opened. Officer R took the potato chip bag and any remaining chips back to the segregation unit.

Approximately one or two hours after the incident, Grievant and Officer B spoke with the Inmate. Grievant told the Inmate he did not appreciate the Inmate mistaking his kindness for weakness.

The Major told Grievant to write a charge against the Inmate. Grievant charged the Inmate with stating false information about a staff member.

The Inmate did not know that Grievant and Ms. E ate his potato chips.

During the Agency's investigation, Grievant provided several different accounts of the incident. In Grievant's first account, he said he conducted a "pat down" search of the Inmate. In his fourth account, Grievant did not say he conducted a pat down search because he did not know what was under the Inmate's shirt. The Warden laid out all four of Grievant's statements and asked Grievant which one was true. Grievant said there was a little bit of truth in all of them.

The Agency removed Ms. E from employment.

On or about August 9, 2018, the grievant was issued a Group III Written Notice with termination for "fraternization, non-professional association, and conduct unbecoming an employee of the Commonwealth."[4] The grievant timely grieved the disciplinary action and a hearing was held on November 28, 2018.[5] In a decision dated April 3, 2019, the hearing officer determined that the agency had presented sufficient evidence to justify the issuance of a Group

[4] *Id.* at 1.
[5] *Id.*

III Written Notice with termination and upheld the disciplinary action.[6] Both parties now appeal 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."[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 either 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.

Agency's Claim Regarding "Improprieties"

In its request for administrative review, the agency argues that the hearing officer's findings of fact, based on the weight and credibility he accorded to testimony presented at the hearing, are not supported by the evidence in the record. 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 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.

The agency asserts that the hearing officer erred in not finding that the grievant had engaged in "improprieties." The agency's policy appears to define "improprieties" as "[a]ssociations between staff and offenders that may compromise security, or undermine the employee's ability to carry out their responsibilities," and states that such misconduct "may be treated as a Group III offense."[14] The agency argues that the grievant became a participant in an "impropriety" between the offender and Ms. E by failing to search the offender and by "participating in the delivery of contraband from an offender to another employee," which, the

[6] *Id.* at 5-7.
[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.
[14] Agency Exhibit 4 at 4.

agency asserts, made the grievant an "accomplice" to Ms. E's misconduct. The assertion that the Written Notice was justified because the grievant was an "accomplice" is not a charge that appears in the hearing record or, importantly, within the Written Notice.[15] As such, that aspect of the agency's claim will not be addressed further.

The hearing officer determined that the grievant had not engaged in an "impropriety" because there was no evidence of an "association" between the grievant and the offender.[16] The hearing officer essentially addressed the agency's argument on this point, finding that the grievant's conduct of not searching the offender as indicative of failing to prevent a potential impropriety between Ms. E and the offender, rather than an association between the grievant himself and the offender.[17] As the agency notes, the policy does not define "associations." Accordingly, the hearing officer appears to have applied a reasonable interpretation that would require some evidence of connection or relationship to establish such an "association." The hearing officer found there was no such evidence in the record.

Based on EDR's review, the hearing officer's factual findings appear supported by the record, or lack of evidence therein. The hearing officer found that the grievant's failure to search the offender was misconduct, but did not find that this failure demonstrated the creation of an "association." 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.

Grievant's Due Process Claims

The grievant argues that the hearing officer erred by upholding the discipline based on misconduct not charged in the Written Notice. As such, the grievant alleges that his due process rights have been violated. Constitutional due process, the essence of which is "notice of the charges and an opportunity to be heard,"[18] is a legal concept appropriately raised with the circuit court and ultimately resolved by judicial review.[19] Nevertheless, because due process is inextricably intertwined with the grievance procedure, EDR will also address the issue.

Prior to certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.[20] Importantly, the pre-disciplinary notice

[15] *See* Agency Exhibit 1.
[16] Hearing Decision at 6.
[17] *Id.*
[18] *E.g.*, Davis v. Pak, 856 F.2d 648, 651 (4th Cir. 1988); *see also* Huntley v. N.C. State Bd. Of Educ., 493 F.2d 1016, 1018-21 (4th Cir. 1974).
[19] *See* Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[20] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."). State policy requires that

and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[21]

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to confront and cross-examine the accuser in the presence of the decision-maker; an opportunity to present evidence; and the presence of counsel.[22] The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.[23]

The grievant argues in his request for administrative review that the hearing officer upheld the discipline based on offenses not listed on the Written Notice. Section VI(B) of the *Rules for Conducting Grievance Hearings* (the "*Rules*") provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."[24] Our rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.[25] In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified" cannot be remedied through a hearing."[26] Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

The grievant asserts that the Written Notice in this case is "horribly worded." Indeed, a failing in this Written Notice is that it lists a brief statement of facts found in the agency's investigation and quotations of various policy provisions, but nowhere does it state how the

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> [p]rior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

DHRM Policy 1.60, *Standards of Conduct*, § E(1). Significantly, the Commonwealth's Written Notice form instructs the individual completing the form to "[b]riefly describe the offense and give an explanation of the evidence."

[21] *Loudermill*, 470 U.S. at 546.

[22] Detweiler v. Va. Dep't of Rehabilitative Services, 705 F.2d 557, 559-561 (4th Cir. 1983); *see* Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1284 (4th Cir. 1995) ("'The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity' for a full hearing, which includes the right to 'call witnesses and produce evidence in his own behalf,' and to 'challenge the factual basis for the state's action.'" (quoting Carter v. W. Reserve Psychiatric Habilitation Ctr., 767 F.2d 270, 273 (6th Cir. 1985))).

[23] See Virginia Code Section 2.2-3004(E), which states that the employee and agency may be represented by counsel or lay advocate at the grievance hearing and that both the employee and agency may call witnesses to present testimony and be cross-examined. In addition, the hearing is presided over by an independent hearing officer who renders an appealable decision following the conclusion of hearing. *See* Va. Code §§ 2.2-3005, 2.2-3006; *see also Grievance Procedure Manual* §§ 5.7, 5.8 (discussing the authority of the hearing officer and the rules for the hearing).

[24] *Rules for Conducting Grievance Hearings* § VI(B) (citing O'Keefe v. United States Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002)(holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

[25] *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720.

[26] *Rules for Conducting Grievance Hearings* § I.

grievant's conduct violated the various policy provisions that are cited. Nevertheless, the hearing officer determined that there was evidence presented to establish that the grievant engaged in misconduct that was properly considered a Group III offense that justified his termination.[27] Therefore, the question at issue here is whether there is a sufficient basis to find that the hearing officer upheld the disciplinary action for behavior that within the scope of the misconduct charged on the Written Notice.

The agency, which bears the burden of proof at hearing, must provide notice of the charges and supporting facts stated in a sufficiently clear manner to allow for a full and fair defense of the charges. While a grievant may be aware of the facts surrounding the Written Notice, he would also need to know why or on what theory he is being disciplined by the agency.[28] In this regard, the Written Notice at issue in this case lacks clarity. However, we cannot conclude that the grievant did not have notice of the facts constituting the misconduct for which he was disciplined. Both the due process notice issued to the grievant and the Written Notice itself indicate at least two instances of misconduct by the grievant: 1) the grievant's failure to search the offender upon entry at the medical department, and 2) bringing the bag of chips to Ms. E and joining her in eating the chips.[29] The hearing officer found that it was this precise misconduct that supported the issuance of a Group III Written Notice with termination.[30] The hearing officer relied on a policy cited in the Written Notice,[31] the agency's *Standards of Conduct* policy, which provides:

> [t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.[32]

On this basis, the hearing officer determined that the facts supported the issuance of a Group III Written Notice under the *Standards of Conduct* policy. As a matter of the grievance procedure, EDR finds that the grievant's misconduct was sufficiently charged on the Written Notice to provide adequate due process.

The hearing officer also appears to refer to the grievant's act of obtaining the chips and taking them to Ms. E as "complet[ing] the delivery of contraband."[33] Although the hearing officer's findings on this issue are unclear, it does not appear that the hearing officer determined that the grievant's conduct was a violation of the agency's policies on contraband. Indeed, nothing in the Written Notice charged the grievant with a violation involving "contraband."[34] However, the Written Notice does charge the grievant with having engaged in misconduct by

[27] Hearing Decision at 5.
[28] *See* EDR Ruling 2007-1409.
[29] Agency Exhibits 1, 9.
[30] Hearing Decision at 5. EDR has reviewed nothing in the record or the parties' respective appeals that would suggest that the grievant was not aware that he was required to search the offender.
[31] Agency Exhibit 1.
[32] Hearing Decision at 5.
[33] *Id.*
[34] *See* Agency Exhibit 1. See below for further discussion of the contraband issue.

bringing the chips to Ms. E and eating the chips.[35] The hearing officer has clearly determined that the grievant's misconduct justified the Group III Written Notice with termination.[36] EDR cannot find that the grievant did not have notice of the allegedly inappropriate conduct that ultimately led to his termination being upheld.

Finally, we note that the grievant had a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and the opportunity to have counsel present. Accordingly, we believe, as do many courts, that based upon the full post-disciplinary due process provided to the grievant, any lack of pre-disciplinary due process was cured by the extensive post-disciplinary due process. EDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions.[37] However, we are persuaded by the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.[38] Accordingly, EDR finds no due process violation under the grievance procedure.

Grievant's Factual Arguments Regarding "Contraband"

The grievant's request for administrative review raises additional challenges to the hearing officer's characterization of the chips as "contraband." However, the hearing officer appears to use the term "contraband" in a general way, rather than with the precise definition of the term under agency policy in mind.[39] The hearing officer clearly referred to the chips as something the offender should not have had or tried to deliver, hence the use of the term "contraband" to refer to the possession and transport of a prohibited item. The hearing officer did not make specific findings that the chips were contraband under the definition used in the agency's policy, or that the grievant violated the agency's contraband policy.[40] Rather, the hearing officer found that it was inappropriate for the offender to attempt to bring the chips to Ms. E, as well as for the grievant to actually bring the chips to Ms. E. Generally referring to the chips in this manner as contraband appears to be a reasonable, colloquial description of the offender's and the grievant's behavior.[41] Thus, we need not address this issue as a separate charge of misconduct for violating the agency's contraband policy or discuss the grievant's factual arguments about the definition of contraband. The fact that the hearing officer referred to the chips as "contraband" does not change his underlying analysis of the grievant's misconduct in this case.[42]

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[35] Agency Exhibit 1.
[36] Hearing Decision at 5.
[37] *See, e.g.,* Cotnoir v. University of Me. Sys., 35 F.3d 6, 12 (1st Cir. 1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation.").
[38] *E.g.*, Va. Dep't of Alcoholic Bev. Control v. Tyson, 63 Va. App. 417, 423-28, 758 S.E.2d 89, 91-94 (2014); *see also* EDR Ruling No. 2013-3572 (and authorities cited therein).
[39] *See* Hearing Decision at 5.
[40] *See id.* The agency's contraband policy is not cited in the decision.
[41] For example, nothing in the hearing officer's analysis would change if the "contraband" were simply referred to as "the chips."
[42] EDR has reviewed no argument or evidence that the offender was permitted to deliver the chips to Ms. E. In a similar vein, there is nothing in the record to suggest that it was appropriate for the grievant and Ms. E to take and eat the chips.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Both parties' requests for administrative review are respectfully denied. 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.[43] 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.[44] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[45]

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[43] *Grievance Procedure Manual* § 7.2(d).
[44] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[45] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).