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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2019-4914
May 24, 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 11282. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 11282, as found by the hearing officer, are as follows:[2]

> The Department of Corrections employs Grievant as a Corrections Sergeant at one of its facilities. He has been employed by the Agency for approximately 32 years. No evidence of prior active disciplinary action was introduced during the hearing.
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> Grievant worked in Housing Unit 3. His Post Order designated Grievant's supervisor as "Unit Three Supervisor (Lieutenant)."
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> [An] Inmate was in a cell in the segregated portion of Housing Unit 3. He was on a "15 minute watch" meaning his physical status was to be observed every 15 minutes. He was placed on that status because of concerns regarding his mental health. The Inmate was a dangerous inmate. He had been held in a "segregation cell" and was then placed in a "mental health cell" or "suicide cell."
> . . .

[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. 11282 ("Hearing Decision"), Apr. 8, 2019, at 2-3.

> On February 26, 2018, Grievant was the supervisor for Housing Unit 3. No Lieutenant was working with Grievant in Housing Unit 3.
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> On February 26, 2018, Grievant noticed that the Inmate had an ink pen and paper that he was not permitted to have. The ink pen was a sharp object that the Inmate could use to hurt himself or others. The Inmate had written "HUNGER STRIKE" and "PROTEST TIL I SEE INTEL AND WARDEN" on the paper. Grievant decided it would be necessary to search the Inmate's cell to retrieve the ink pen and paper and determine if the Inmate had any additional contraband. . . .
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> Grievant instructed the Inmate to "cuff up." This meant that the Inmate was to place his hands behind his back, back up to the tray slot in the cell door, and allow a corrections officer to place handcuffs on the Inmate. Once handcuffs were placed on the Inmate, corrections officers could enter the cell. The Inmate refused to be placed in restraints. . . .
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> At approximately 7:20 p.m., Grievant instructed the Control Booth Officer to open the Inmate's cell door. Grievant and Officer D entered the cell. A "scuffle" occurred, but it was not a "boxing match." Grievant secured the Inmate's right hand. Officer D secured the Inmate's left hand. . . . Officer B put the handcuffs on the Inmate and laid the Inmate on the bunk. Officer D searched the cell. At approximately 7:27 p.m., Grievant, Officer D, and Officer B left the cell.
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> The Inmate remained in restraints. Grievant instructed the Inmate to come to the tray slot of the cell door so that the restraints could be removed. The Inmate refused to do so. At approximately 7:33 p.m., Grievant called Lieutenant G to come to Housing Unit 3. Lieutenant G arrived at Housing Unit 3. The Inmate complied with Lieutenant G's instruction to put his hands through the tray slot so that the cuffs could be removed.

On April 9, 2018, the agency issued to the grievant a Group II Written Notice of disciplinary action. Citing the agency's Operating Procedure 420.2, the Written Notice specified that the grievant "failed to notify the proper chain of command before entering the unrestrained offender's cell."[3] The grievant timely grieved this disciplinary action, and a hearing was held on January 10, 2019.[4] In a decision dated April 8, 2019, the hearing officer determined that the Group II Written Notice issued to the grievant was justified because the grievant "failed to comply with Operating Procedure 420.2."[5] The hearing officer also concluded that the grievant had not shown that the agency issued the Group II Written Notice in retaliation for the grievant's earlier grievance regarding another matter.[6]

[3] Agency Ex. 1 at 1.
[4] Hearing Decision at 1.
[5] *Id.* at 4.
[6] *Id.* at 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."[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.

Misconduct Under Agency Policies

In his request for administrative review, the grievant argues that the hearing officer erred in upholding the Group II Written Notice in part because, lacking the benefit of hindsight, the grievant reasonably believed that applicable agency policies permitted him to enter the unrestrained inmate's cell to retrieve potentially dangerous contraband, without seeking specific approval.

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 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.

Here, the hearing officer made appropriate factual determinations that the grievant engaged in the behavior charged on the Group II Written Notice,[14] that his behavior constituted

[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] Hearing Decision at 3.

misconduct,[15] and that the discipline was consistent with law and policy.[16] Specifically, the hearing officer found that the grievant violated the section of the agency's Operating Procedure 420.2 pertaining to "Restraints Applied Within a Cell for Behavior Management."[17] The relevant provision states:

> Offenders may be restrained within a cell when their action poses a physical threat to themselves or others, but only when the Facility Unit Head or designee determines that other less restrictive alternatives have not been effective or would not be effective.[18]

On review of the hearing record, EDR finds evidence to support the hearing officer's conclusion that the grievant's failure to notify any supervisor before entering the unrestrained inmate's cell – and thereafter using force to apply restraints to the inmate – constituted misconduct. Agency policy permits a building supervisor to authorize opening an unrestrained inmate's cell door during an emergency situation.[19] However, even assuming the grievant was the building supervisor at the time, the hearing officer did not find any such emergency situation was present such that notification to the appropriate authority could not be made.[20] Upon entering the open cell, the grievant and two other officers restrained the inmate by force – without obtaining approval to use force.[21] These circumstances support the hearing officer's determination that the grievant violated Operating Procedure 420.2 and failed to notify the proper authority in advance, as stated on the Group II Written Notice issued to him by the agency.[22]

The hearing officer further determined that, because the inmate "was not actually in the process of harming himself," the grievant had "sufficient time . . . to contact a supervisor to obtain approval for the cell entry."[23] Based on these facts, the hearing officer rejected the grievant's claim that a competing obligation to remove potentially harmful items[24] superseded the grievant's duty to notify a supervisor before entering the cell and using force to restrain the inmate. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority. EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where, as here, the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer.[25]

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[15] *Id.* at 4-5.
[16] *Id.* at 4, 6.
[17] *Id.* at 4 (citing Hearing Officer Ex. 1 (Va. Dep't of Corrs. Operating Procedure 420.2, eff. May 1, 2015)). The hearing officer based his policy findings on the version of Operating Procedure 420.2 that was in effect on February 26, 2018, when the grievant's underlying conduct occurred. The agency updated Operating Procedure 420.2 in May 2018. *See* Agency Ex. 4.
[18] Hearing Officer Ex. 1 at § III(E)(2).
[19] Agency Ex. 5 at 3.
[20] *See* Hearing Decision at 5.
[21] Agency Ex. 5 at 5.
[22] Hearing Decision at 4.
[23] *Id.* at 5.
[24] *See* Operating Procedure 730.5.
[25] *See, e.g.*, EDR Ruling No. 2014-3884. In his request for administrative review, the grievant points to EDR Ruling No. 2011-2877, which upheld a hearing officer's finding that the agency's justification for discipline was unreasonably based on "hindsight knowledge" not available to its employee at the time. That conclusion was

Retaliation

In his request for administrative review, the grievant also argues that the agency failed to prove that the Group II Written Notice was legitimate and non-retaliatory discipline. After concluding that the Written Notice was justified in light of the grievant's misconduct, the hearing officer made the following findings regarding the grievant's retaliation claim:

> Grievant engaged in protected behavior because he filed a grievance challenging the Agency's failure to hire him as a Lieutenant. Grievant asserted that Lieutenant G was aware of that grievance. Grievant suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between his protected activity and the adverse employment action. The Agency did not take disciplinary action as a pretext for retaliation.[26]

EDR finds that the record supports the hearing officer's conclusion that the grievant failed to establish a causal connection between his earlier grievance and the Group II Written Notice at issue here. Because the agency had shown that its disciplinary action was warranted and appropriate, the grievant had the burden to prove that he would not have received a Group II Written Notice but for filing his earlier grievance.[27] The hearing officer found that a preponderance of the evidence did not demonstrate a connection between the earlier grievance and the agency's disciplinary action. After a thorough review of the record, EDR cannot say that the hearing officer's conclusion is inconsistent with law or policy, or is otherwise unreasonable.

Although the grievant may disagree with the decision, 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 final hearing decision once all timely requests for administrative review have been decided.[28] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to

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supported by the apparent absence of any agency policy that should purportedly have guided the employee's decision-making. *See* EDR Ruling No. 2011-2877 at 7. Those circumstances are not involved in this instance.

[26] Hearing Decision at 5.

[27] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

[28] *Grievance Procedure Manual* § 7.2(d).

the circuit court in the jurisdiction in which the grievance arose.[29] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[30]

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