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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5163
October 30, 2020

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 11529. For the reasons set forth below, EDR remands the case to the hearing officer for further consideration and clarification.

FACTS

The relevant facts in Case Number 11529, as found by the hearing officer, are as follows:¹

The [agency] employed Grievant as a Housing Unit Manager at one of its Facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for overseeing the Housing Unit and supervising one Lieutenant, four Sergeants, four Case Workers, and sixteen to twenty Corrections Officers working several shifts.

Grievant’s usual work shift began at 8 a.m. and ended at 4:30 p.m.

Grievant had a personal errand to take care of in the morning of August 21, 2019. On August 20, 2019, Grievant sent his subordinate, the Lieutenant, a text message saying he would “be in at 0930” on the following day. Grievant did not obtain permission from his Supervisor to be late. If Grievant had sought permission from his Supervisor to be late to work, the Supervisor would have granted his request.

On August 21, 2019, Grievant arrived at the Facility at approximately 10:02 a.m. He entered the Support Building at approximately 10:10 a.m. Grievant spoke with Counselor S about classification actions for several offenders. Grievant left

¹ Decision of Hearing Officer, Case No. 11529 (“Hearing Decision”), September 10, 2020, at 2-3.

Counselor S's office and spoke with Counselor W at Counselor W's request. They discussed an annual review of an offender.

At approximately 10:37 a.m., an Inmate in the Housing Unit was assaulted by another inmate and died. Counselor S heard a radio call of an emergency in the Housing Unit. She went to tell Grievant and Grievant immediately left the Support Building headed towards the Housing Unit.

Grievant arrived at the Housing Unit at approximately 10:41 a.m.

Grievant determined that a Corrections Officer was not present on the Unit floor during mass movement as required by Facility practice. Grievant initiated disciplinary action against that Corrections Officer. Grievant also initiated disciplinary action against a Sergeant who was not in the Unit when expected. The Housing Unit Lieutenant also received disciplinary action for not being present in the Unit at the time of the inmate assault.

An internal investigation showed that no staff were near the inmates as required by Facility practice. If staff had been near the Inmate, the Agency believed that the likelihood of that Inmate's death would be much lower.

On March 24, 2020, the agency issued to the grievant a Group III Written Notice with termination, citing "[g]ross negligence on the job that results in the escape, death, or serious injury of a ward of the state" ² The Written Notice specified that, at the time of a fatal assault on an inmate during a "mass movement" of inmates, "there was no staff coverage present in or around [the site]." ³ Noting that the grievant had come to work late that morning without authorization, the Written Notice further stated:

As the Unit manager it is your responsibility to ensure: 1) adequate staff in your unit, 2) staff is appropriately supervising offenders during mass movement, 3) in your absence, the Unit supervisors are present in the building especially during mass movement of offenders.

It has been clearly established that a lack of proper supervision and accountability in the housing unit(s) contributed to the serious nature of this incident. ⁴

The grievant timely grieved the Written Notice, and a hearing was held on July 21, 2020. ⁵ In a decision dated September 10, 2020, the hearing officer concluded that the agency "presented sufficient evidence to support the issuance of a Group II Written Notice" for failing to report to work as scheduled without proper notice. ⁶ The hearing officer reasoned that this offense, which

² *Id.* at 1; Agency Ex. 1, at 1-2.

³ Agency Ex. 1, at 1-2.

⁴ *Id.*

⁵ Hearing Decision at 1.

⁶ *Id.* at 3.

would normally merit disciplinary action only at the Group II level, presented no basis to elevate discipline to Group III and, therefore, the grievant must be reinstated.⁷ The agency 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.”⁸ 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.⁹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁰ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency contends that the hearing officer’s reduction of discipline was erroneously based on late arrival to work without authorization, which the agency argues was merely an “underlying factor” in its broader disciplinary action for “lack of proper supervision” articulated in the Group III Written Notice.¹¹ The agency points to testimony that the grievant fostered a “culture of lax supervision” in which employees did not monitor the unit properly – a situation that was exacerbated when the grievant failed to make his own supervisor aware of the need to oversee appropriate staffing in his absence.¹² The agency argues that its testimony established a basis to find that the grievant’s lack of supervision on the morning of August 21, 2019 amounted to gross negligence.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁴ 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.¹⁵ Thus, in disciplinary actions, the hearing officer

⁷ *Id.* at 3-4.

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Request for Administrative Review at 1, 3. The grievant replied to the agency’s request on October 25, 2020, arguing in part that the agency’s request should be dismissed on grounds that the agency failed to send a copy of the request to the grievant or otherwise notify him of it. Reply at 2. EDR is not aware of any procedural requirement for dismissal to be the default remedy for failure to timely notify the other party of its filings. In any event, EDR has accepted the grievant’s reply to the request and, accordingly, perceives no prejudice to either party in considering and ruling on the agency’s request. To the extent that the grievant’s reply independently challenges aspects of the hearing decision, such challenges are untimely and, as such, are not addressed in this ruling. See *Grievance Procedure Manual* § 7.2(a); *Rules for Conducting Grievance Hearings* § VII(A).

¹² Request for Administrative Review at 3.

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

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.¹⁶ 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.

The agency essentially argues that the hearing officer failed to make findings as to the full charges articulated in the Group III Written Notice and whether the agency met its burden to prove them. EDR agrees that the issue of deficient supervision appears to have been central to the agency's stated basis for its disciplinary action. The Group III Written Notice alleged that "there was no staff coverage present" where the inmate was assaulted and that the grievant was responsible for ensuring adequate staffing even in his absence, especially during mass movement of inmates.¹⁷ The Written Notice expressed that "lack of proper supervision" of the grievant's unit contributed to the assault.¹⁸ Likewise, at the hearing, the agency asserted as its theory of the case that the grievant committed misconduct not only because he himself was not present on the unit during mass movement, but also because he failed to ensure proper staff coverage such that staff "was appropriately supervising offenders . . . and that, in his absence, . . . someone was present in the building during mass movement."¹⁹ The agency then presented testimony from multiple witnesses regarding the extent of the grievant's failure to supervise the housing unit.²⁰

Based on this record, EDR concludes that the alleged inadequacy of the grievant's supervision of the unit as charged on the Written Notice was a material issue raised by this grievance. Under the grievance statutes and the *Rules for Conducting Grievance Hearings*, hearing officers must produce written decisions that include findings of fact on the material issues in a case and resolve the grievance on the merits of the substantive issues qualified.²¹ However, upon review of the hearing decision in this case, EDR is unable to identify findings of fact or conclusions of policy regarding the grievant's alleged failure to supervise the unit effectively or regarding the extent to which the grievant, as a supervisor, could appropriately be disciplined on grounds that none of his staff was covering the housing unit during a mass movement of inmates.

Although the hearing decision resolved the issue of whether the grievant failed to report to work without authorization, it appears to be undisputed that the grievant had reported to work by the time the assault occurred.²² The agency has asserted throughout the disciplinary process, up to

¹⁶ *Grievance Procedure Manual* § 5.8.

¹⁷ Agency Ex. 1, at 1-2.

¹⁸ *Id.* at 2.

¹⁹ Hearing Recording at 12:15-13:05 (agency's opening statement).

²⁰ *See id.* at 19:30-25:30, 58:25-1:03:40 (testimony of Regional Operations Chief); *id.* at 1:30:25-1:33:45 (testimony of grievant's former supervisor); *id.* at 2:10:00-2:13:50 (testimony of major); *id.* at 2:29:05-2:32:05 (testimony of disciplining warden).

²¹ *See* Va. Code § 2.2-3005.1(C); *Rules for Conducting Grievance Hearings* §§ II; V(C)

²² *See* Hearing Decision at 2-3. The agency has challenged the hearing officer's conclusion that "[w]hether Grievant had permission . . . to be late to work on August 21, 2019 did not affect the Facility's operations," *see* Request for Administrative Review at 3, but EDR cannot find that this conclusion is erroneous or unreasonable in light of the

and including its request for administrative review, that it sought to hold the grievant responsible for the fact that “no staff were near the inmates” during mass movement on August 21, 2019²³ – regardless of whether the grievant himself was absent from work or authorized to be absent. To the extent that the hearing officer in fact concluded that the evidence did not support unsatisfactory supervision in this regard, such a conclusion is not clearly reflected in the hearing decision such that EDR can evaluate it upon administrative review.

Accordingly, EDR must remand the decision to the hearing officer to articulate his findings on the material issues of whether the grievant had supervisory responsibilities that he failed to meet as of August 21, 2019, as alleged by the Group III Written Notice, and whether the agency met its burden to prove that such failures constituted misconduct warranting a Group III Written Notice with termination under applicable law and policies. EDR notes that the agency has specifically challenged the hearing officer’s determination that “nothing about Grievant’s behavior . . . would meet the customary legal definition of negligence.”²⁴ To the extent that the hearing officer’s determinations on remand rely on his interpretation of “negligence” or “gross negligence,” the reconsideration decision should articulate findings as to whether those terms describe the grievant’s exercise of supervisory responsibilities in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further evaluation of the evidence in the record as necessary to make findings of fact on the material issues of this case, and to reconsider and/or clarify his conclusions of policy accordingly.

Both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.²⁵ 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

undisputed finding that the grievant had arrived at work when the assault occurred. Hearing Decision at 2-3. The agency’s request for administrative review does not appear to challenge the hearing officer’s findings of fact in this regard, and EDR’s review of the record likewise suggests nothing to call those findings into question. Similarly, to the extent the hearing officer’s conclusions of policy sustained the offense of failing to report to work without authorization, the agency has not challenged those conclusions and EDR finds no basis to disturb them.

²³ See Request for Administrative Review at 2-3.

²⁴ *Id.* at 3; see Hearing Decision at 4.

²⁵ See *Grievance Procedure Manual* § 7.2.

²⁶ *Id.* § 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).

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