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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5174
November 10, 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 11548. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11548, as found by the hearing officer, are as follows:¹

Grievant had been employed by the Agency for approximately 20 years. Grievant had no previous disciplinary actions.

Grievant was a Correctional Officer. She worked as a medical transport personnel, that is she accompanied inmates from their cells to the medical unit, waited for them, and escorted them back to the cell block after their treatment.

This [agency] facility housed inmates with mental health disorders. The inmate with whom Grievant was believed to be having unprofessional conduct was diagnosed as having a factitious disorder, that is he believed things that were not actual or factual.

Inmates are able to communicate with certain persons on an approved list who are located outside the facility in two ways. One is by telephone which is paid for by the receiver and handled through an independent agency. The other is “J-Pay,” which is a limited internet-like system for email transmission. Both methods are monitored by the facility and can be reviewed.

In February 2020, Inmate communicated with his sister and asked her to find data on Grievant such as where she lived, if she was living with someone, and

¹ Decision of Hearing Officer, Case No. 11548 (“Hearing Decision”), October 1, 2020, at 2-5 (citations omitted).

so forth. Thereafter, Inmate asked his sister to accept and transport messages from himself to Grievant. Inmate created a “code name”, that being “Jennifer Blevins.” There was more than ample proof that Inmate intended “Jennifer Blevins” to be Grievant.

Inmate was infatuated with Grievant. There were numerous “love letters” that Inmate sent to his sister to be transported to Grievant.

Investigator had been with the Department of Corrections for 28 years. He had been an institutional investigator for the last 5 years. Investigator received an anonymous note that something was going on with Grievant and Inmate. He subsequently received a note from a named inmate stating the same allegation. Investigator stated this caused him to start an inquiry. He stated after he felt he had enough evidence[,] he reported to the warden.

Investigator interviewed witnesses, reviewed emails and phone calls and screened the rapid eye video in and about the medical office.

Three witnesses in addition to the Investigator and the Warden gave testimony.

Witness One was a nurse in the facility. . . . [S]he reported she gave Inmate his catheter kit. Inmate reported to her that there was only one glove in the cup, and that he had two hands. Grievant then stated, “What are you saying, it takes two hands?”

Witness One on cross examination stated it made her feel “uncomfortable” but that no sexual reference such as the word “penis” was used and nothing more was said.

Witness Two was a social worker at the facility. She saw inmates in group therapy sessions. Inmate was one of her patients. Witness Two stated she had seen Grievant and Inmate in the hall adjacent to the medical room on a few occasions whispering and standing close but did not recall any touching. Witness Two described Inmate’s mental illness as Factitious Disorder. That is by example, for some time he believed he couldn’t walk. She believed Inmate could be delusional.

Witness Three was a nurse practitioner at the facility. She noted that when Grievant brought Inmate to the medical waiting area it would only take 5 minutes if Inmate’s prep kit was ready. Sometimes it took longer. She stated she never saw Inmate and Grievant touching one another. Sometimes Inmate and Grievant would converse, other times not. Witness Three stated on previous admissions Inmate always wanted transferred out of the facility but this admission he wanted to stay at this facility.

Inmate told Witness Three that he was being investigated about an affair with Grievant and called her by first name. However, he also told Witness Three

he was using a code name and the person to whom he was sending his messages was really a person at [a jail in another locality].

When Witness Three heard that one of Inmate's sisters had passed away, although she was not on duty, she called to see how Inmate was reacting to the news. Witness Three reported Inmate was asking for Grievant. Witness Three said she never saw Inmate being brought to the medical department with anyone other than Grievant. Witness Three did not believe Inmate was delusional.

Agency's fourth witness was the Institutional Investigator. He had been employed by Agency for 28 years and had been an investigator for 9 years.

After hearing rumors of a relationship between Inmate and Grievant, he started an investigation. Investigator reviewed phone calls, emails, rapid eye video, and interviewed Agency personnel.

It was established through 23 phone calls that Inmate was calling his sister first to ask her to find information about Grievant and then later to relay messages to a code name "Jennifer Blevins." There was ample evidence that "Jennifer Blevins" was intended to be Grievant. Although in Inmate's mind it was sometimes some other party at another institutional location. Two other women's names were mentioned. Investigator reported that Inmate told his sister about his ability to have conjugal visits with Grievant. Investigator stated there are never conjugal visits allowed at the facility. Investigator stated none of the phone calls monitored were Grievant's voice.

Investigator also reviewed 37 email messages which were similar to the phone calls. All messages were romantically inclined. Some were specific about Grievant's activities such as her days off and Inmate seeing her from his window. Investigator reviewed rapid eye camera videos and produced times that he believed Grievant was in close proximity to Inmate. Investigator produced a video of Grievant with her shirt tail untucked while escorting Inmate.

Investigator talked to other staff about anything they observed about Grievant.

Investigator alleged two of the many correspondences through Inmate's sister were replies from "Jennifer," however Investigator admitted he had no evidence any correspondence came directly from Grievant and he wasn't able to connect the replies directly to Grievant.

The fifth witness was the Warden. He has been employed as Warden at the facility for the last 1½ years. Warden was not privy to any firsthand observation. Warden stated that fraternizing with an inmate was a very serious matter which impacted on safety to the facility.

Warden stated when he met with Grievant she was visibly upset. Warden believed the videos he saw of Inmate and Grievant indicated Grievant was letting

Inmate stand too close to her. Warden could not verify the “Jennifer Blevins” messages either went to or came from Grievant. They were all traced to Inmate’s sister. Warden never heard Grievant’s voice in a phone conversation with Inmate. Warden stated Inmate said “crazy stuff.” Warden stated Grievant told him she had “f***ed up” when interviewed but did not know specifically what she was referring to other than perhaps Grievant let inmates stand too close to her.

Videos of Grievant with the many other inmates she accompanied to medical were not introduced to fact check what her normal proximity distance might be.

Warden stated that fraternizing with an inmate is a zero-tolerance issue and a very serious infraction that could not be mitigated by Grievant’s previous good record.

On May 11, 2020, the agency issued to the grievant a Group III Written Notice with removal for violating its Operating Procedure (“OP”) 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*, alleging that the grievant “failed to maintain professional boundaries” with the inmate.² The grievant timely grieved the disciplinary action, and a hearing was held on September 11, 2020.³ In a decision dated October 1, 2020, the hearing officer concluded that a Group III Written Notice was not supported because “[t]here is not a single actual trace to Grievant that Grievant engaged in or encouraged Inmate’s behavior” and video of the grievant’s alleged close proximity was not conclusive as to the issue of misconduct.⁴ Accordingly, the hearing officer ordered the agency to rescind the Written Notice and to reinstate the grievant.⁵ The agency 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 either 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 officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record

² Agency Ex. 7; see Hearing Decision at 1; Agency Ex. 5.

³ See Hearing Decision at 1.

⁴ *Id.* at 1, 6.

⁵ *Id.* at 6.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

for those findings.”¹⁰ 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.¹¹ 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.¹² 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 its request for administrative review, the agency argues that the hearing officer failed to adequately consider documentary evidence that linked the grievant to the fraternization alleged in the Written Notice, primarily contained in the agency’s investigative report.¹³ In summary, the agency asserts that: (1) the inmate’s sister represented to him on multiple occasions that she had contact from the grievant; (2) video surveillance at various times showed the grievant in close physical proximity to the inmate, with body language suggesting intimacy or excessive familiarity and giving one or more items to the inmate; and (3) the grievant made a comment to the inmate that had sexual connotations.¹⁴ The agency also suggests that the grievant’s decision not to present her own testimony or other evidence, thereby avoiding cross-examination, should merit an adverse inference.¹⁵

Consideration of Evidence

The hearing officer concluded that, although the agency had presented “more than ample evidence Inmate was sending romantic notes to his sister’s account” and that “most of his unrealistic emotions were intended for Grievant,” the agency had not presented evidence to show conduct by the grievant herself that would constitute misconduct.¹⁶ The agency contends that it presented a volume of circumstantial evidence sufficient to corroborate its charge that the grievant and the inmate had an improper relationship, and that the hearing officer ignored this evidence.

Upon a thorough review of the record, EDR finds nothing to suggest that the hearing officer’s consideration of the evidence was incomplete, erroneous, or otherwise unreasonable. The agency asserts that the inmate’s sister shared several messages purportedly addressed to the inmate from someone named “Jennifer” or “Jenn.” While the hearing officer found that the inmate used the name “Jennifer Blevins” to refer to the grievant, she also noted evidence that “in Inmate’s mind it was sometimes some other party at another institutional location”¹⁷ and that the inmate had a

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ *See* Request for Administrative Review at 2-3.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ Hearing Decision at 6. The hearing officer indicated that the evidence could show that the grievant stood too close to the inmate, but she noted that the record presented no comparison for her to gauge the grievant’s proximity as misconduct. *Id.*

¹⁷ Hearing Decision at 4; *see* Hearing Recording at 2:19:10-2:20:20 (testimony by investigator); Agency Ex. 1 at 29.

history of believing things that were not factual.¹⁸ In addition, the investigator “admitted he had no evidence any correspondence came directly from Grievant and he wasn’t able to connect the replies directly to Grievant.”¹⁹ Thus, the hearing officer’s reasoned assessment that these messages were insufficient to prove misconduct by the grievant is supported by evidence in the record.

The agency further asserts that multiple surveillance videos capture the grievant in close physical proximity to the grievant, with body language that could support an improper relationship between them.²⁰ The hearing officer acknowledged the investigator’s testimony about videos showing the grievant “in close proximity to Inmate,”²¹ but she reasoned that no evidence provided a basis for comparison, indicating that she did not find the videos presented to support misconduct independently.²² Upon review of the videos in evidence, EDR finds no basis to disturb the hearing officer’s conclusions in this regard.

Finally, the agency points to a comment acknowledged in the hearing decision, in which the inmate objected to receiving only one glove to use during a self-catheterization and the grievant allegedly responded: “What are you saying, it takes two hands?”²³ Assuming for purposes of this ruling that this comment would be unprofessional or otherwise inappropriate, the hearing officer did not find that such a comment would support a charge of fraternization²⁴ or other terminable misconduct under OP 135.2. EDR cannot find that the hearing officer’s consideration of this comment was erroneous or otherwise unreasonable.

In sum, EDR perceives no error in the hearing officer’s conclusion that the agency failed to prove that the grievant engaged in the misconduct charged – *i.e.* an inappropriate and/or possibly romantic relationship with an inmate. While the agency may take issue with the hearing officer’s implication that it did not present “anything” to link the grievant’s conduct to fraternizing behavior,²⁵ EDR does not interpret the hearing decision to ignore the agency’s circumstantial evidence. Rather, the hearing officer concluded that such evidence did not meet the agency’s burden of proof in this matter. Accordingly, EDR will not disturb the decision.

¹⁸ Hearing Decision at 2, 3.

¹⁹ *Id.* at 5; *see* Hearing Recording at 1:04:30-1:05:10, 1:33:45-1:35:30, 2:18:10-2:19:30 (testimony by investigator).

²⁰ *See* Agency Ex. 4. As one example, the agency asserts that a surveillance video recorded on February 10, 2020, shows the grievant entering the medical unit with the inmate with her shirt tucked in and, several minutes later, leaving with her shirt untucked. Request for Administrative Review at 2; *see* Agency Ex. 4. At the hearing, the hearing officer characterized this particular video as “not conclusive” as to the agency’s assertion. Hearing Recording at 2:09:45-2:11:50. Consistent with that observation, the hearing officer made no findings consistent with the agency’s continued allegation regarding a change in the grievant’s clothing after time spent with the inmate. Upon review of the agency’s video evidence, EDR finds no basis to disturb the hearing officer’s assessment of this evidence.

²¹ Hearing Decision at 4.

²² *Id.* at 6.

²³ *Id.* at 3.

²⁴ OP 135.2 defines fraternization as “[e]mployee association with offenders . . . outside of employee job functions, that extends to unacceptable, unprofessional, and prohibited behavior; examples include non-work related visits between offenders and employees, . . . discussing employee personal matters . . . with offenders, and engaging in romantic or sexual relationships with offenders.” Agency Ex. 5. Although the Group III Written Notice lacks specificity on this point, the agency’s request for administrative review makes clear that, consistent with the arguments it presented at the hearing, the Written Notice was issued for the offense of fraternization under OP 135.2.

²⁵ Hearing Decision at 5.

Adverse Inference

The agency also argues that the grievant “could have offered evidence to bolster her case and her choosing not to do so can be taken as an adverse inference and a way to avoid cross examination.”²⁶ The *Rules for Conducting Grievance Hearings* provide for the authority to “draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or EDR had ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process.”²⁷ Adverse inferences are a potential sanction for misconduct by a party (or its advocate), to be imposed “commensurate with the conduct necessitating the sanction” and the extent to which it materially prejudices the opposing party’s case or otherwise disrupts the integrity of the hearing process.²⁸

Here, EDR identifies no failure on the grievant’s part to comply with an order of the hearing officer, or with the grievance procedure more generally, such that an adverse inference could be warranted under the *Rules*. In this case, it appears that the grievant elected not to testify or otherwise present evidence after the hearing officer advised the parties that she did not believe the agency had presented sufficient evidence to prove the misconduct alleged.²⁹ The agency characterizes this turn of events as “unusual,”³⁰ and EDR agrees. The grievance procedure mandates that the hearing officer’s decision of the case on the merits “must be in writing.”³¹ Further, “[t]he hearing officer must not issue a bench decision immediately following the hearing.”³² These requirements do not necessarily prohibit a hearing officer, in her discretion, from advising the parties of her view of the agency’s case when the agency carries the burden of proof and has rested its case, as occurred here – provided she ultimately issues a written decision that is otherwise in compliance with the grievance procedure.

That said, EDR would strongly urge caution by hearing officers considering this approach during a hearing, in part for reasons illustrated in the agency’s request for administrative review. Specifically, the agency has understandably requested that, should EDR remand this matter, the record not be re-opened to receive the grievant’s evidence, on grounds that the grievant declined her opportunity to present such evidence.³³ In general, EDR favors a process in which the parties present their relevant evidence efficiently to be entered into the record for potential review. A regular practice of advisory or pre-emptive rulings offered during the course of a hearing would be unlikely to serve this goal. While we would ultimately assess such matters on a case-by-case basis (evaluating the balance of equities, procedural efficiency, and other relevant considerations), hearing officers considering such advisories during the hearing should ensure that parties waiving their right to present defenses are fully aware of the risks of doing so.

²⁶ Request for Administrative Review at 3.

²⁷ *Rules for Conducting Grievance Hearings* § V(B).

²⁸ *Id.* § III(E). EDR has consistently rejected the appropriateness of adverse inferences against a party that has complied with all orders from the hearing officer. *See, e.g.*, EDR Ruling No. 2020-5054 (and authorities cited therein).

²⁹ *See* Hearing Decision at 5.

³⁰ Request for Administrative Review at 1.

³¹ *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearings* §§ II, V.

³² *Rules for Conducting Grievance Hearings* § V(A).

³³ Request for Administrative Review at 1-2.

As a more general matter, however, EDR rejects the proposition that adverse inferences may be warranted based solely on a grievant's decision not to offer testimony. And in this case, the issue is moot because we do not remand the matter, and we perceive no prejudice to either party in the hearing officer's choice, in her discretion, to articulate her preliminary view of the agency's case and to offer the parties an opportunity to adjust their strategies accordingly. Ultimately, conclusions as to the credibility of witnesses and the weight of their respective 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 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.³⁴

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.³⁵ 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.³⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁷

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³⁴ See, e.g., EDR Ruling No. 2020-4976.

³⁵ *Grievance Procedure Manual* § 7.2(d).

³⁶ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁷ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).