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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5148
September 25, 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 remand decision in Case Number 11261. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

On July 17, 2018, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for failing to submit to random employee drug testing. Following a timely grievance, on October 30, 2018, the hearing officer issued a decision upholding the grievant's removal, on grounds that the agency proved that the grievant refused to submit to a drug test in violation of its policy. The grievant requested judicial review of the hearing decision, arguing that the random drug test required by the agency violated the grievant's constitutional right to be free from unlawful search and seizure. By order entered on April 5, 2019, the Circuit Court remanded the matter back to the hearing officer "to determine whether Grievant's employment with the [agency] was a 'safety-sensitive job' that qualifies as an exception to the warrant requirement of the Fourth Amendment."

On August 7, 2020, after receiving additional testimony and exhibits into the record, the hearing officer issued a remand decision with findings of fact as follows:[1]

Findings of Fact – Grievant's Work Duties

> The mission of the [agency] "is to enhance the quality of life in the Commonwealth by improving public safety. The Department accomplishes its mission through reintegration of sentenced men and women in the department's custody and care by providing supervision and control, effective programs and re-entry services in safe environments that foster positive change and growth

[1] Remand Decision of Hearing Officer, Case No. 11261-R ("Remand Decision"), August 7, 2020, at 2-8 (citations omitted).

consistent with research-based evidence, fiscal responsibility, and constitutional standards."

The [agency] employed Grievant as a Telecom/Network Coordinator. He began working for the Agency in December 2016.

On December 27, 2016, Grievant signed a Receipt of Operating Procedure 135.4, Alcohol and Other Drug Testing. The Receipt stated, in part:

> All employees including full and part-time, wage, individual contract employees, volunteers and interns who routinely enter DOC Headquarters, regional offices, correctional facilities, probation and parole offices, day reporting programs, detention/diversion centers or court programs are subject to random drug testing. ***
>
> If you test positive for illegal drug use, your employment will [be] terminated. ***

DOC Operating Procedure 135.4 governs Alcohol and Other Drug Testing. Section III contains Definitions. Refusal to Submit to a Substance Abuse Test is defined as:

> When an employee or applicant:
>
> - Fails to remain at the testing site until the drug and alcohol testing process is complete.
> - Fails to provide a urine or oral fluid specimen for any alcohol or other drug test required by this procedure. ***
> - Fails or declines to take a second drug or alcohol test that has been directed by the MRO for this procedure.

Section IV(D)(2) of this policy provides:

> I. If an employee refuses to report for random drug testing on the day they are notified, it will be treated as refusal to test and grounds for termination.

Grievant completed a Computer Applications Access Checklist on September 26, 2016 and October 17, 2017 identifying his ability to access and use DOC Technology Information resources. Out of approximately 47 applications, Grievant was given access only to "Email/Outlook." He was not given access to inmate security related applications such as "VACORIS" which contain information about inmates and "Rapid Eye" which relates to video recording within prisons. Grievant and a supervisor signed the Checklist.

An Employee Work Profile is the "form used to complete the annual performance evaluation that includes a brief work description, performance plan, core responsibilities, performance measures, and employee development goals."

On November 20, 2017, Grievant received an Employee Work Profile effective December 1, 2017. On January 29, 2018, Grievant received another version of his Employee Work Profile effective December 1, 2017.

Grievant's Purpose of Position was:

> To provide technical expertise for managing [the] Department of Corrections' computer networks and telecommunications technology. This includes network administration, performance monitoring, hardware support, project planning, development of technical standards and policies, and providing overall technical leadership.

The Organizational Objective of his position was:

> Evaluates and coordinates voice and wireless communications systems; Administers voice and wireless telecommunications hardware and software applications such as voicemail, directory services, paging systems, and remote messaging devices; Provides technical support to voice systems related project activities.

Grievant's Core Responsibilities (listed in order of importance) included:

> A. Performance Management.
> Responds to instructions and feedback of supervisors in a constructive manner in order to improve personal performance.
>
> B. Telecommunication management for the Department of Local Area Network (LAN) and Wide Area Network (WAN).
> Monitors the development and integration of telephony of telephony systems and services in a LAN/WAN environment with DSL, ISDN, T1, DS3, ATM, routers, switches and hubs. Working knowledge and experience of Cisco's UCaaS and Call Manager and Call Manager Express VoIP solutions. Perform basic telecommunications moves, add, changes, and deletes TSRs. Elevate existing networks, troubleshoot escalated technical issues, and recommend additional solutions and upgrades. Evaluates service requests and coordinates installations. Supports voice and communications systems upgrades. Troubleshoots telecommunications, data services and hardware for remote sites.

> Coordinates with ITP and service providers to resolve system, hardware, and circuit issues. Provide weekly status reports.
>
> C. Prioritizes projects.
> Maintain appropriate networking and two-way communication with Department and external resources. Plans and conducts technical analysis of DOC facilities and offices to identify telecommunications requirements and problems. Verifies hardware configurations and installations. Researches and evaluates new technology to improve telecommunications in the DOC and in the migration of the Department toward IP Telephony. Performs impact analysis including cross platform compatibility.
>
> D. Develops system standards and policies based on analysis of network performance.
> Document specifications for procurement of telephony services and equipment. Develops and implements policies, procedures, and processes. Ensures implementation of technology does not compromise current systems. Performs impact analysis. May lead various projects and report completion to upper management.
>
> E. Provides technical leadership and expertise to Local Support Partners (LSP), Site Technicians, Help Desk, and end users.
>
> F. Other Duties and Special Projects as Assigned by the A&O Manager or CIO.

When Grievant was hired, the Agency expected him to travel 25 [percent] of the time and be on-call rotation. Grievant would sometimes drive a State vehicle. Grievant's Physical Demand Worksheet showed he was expected to spend 80 percent of his time sitting and 20 percent of his time walking.

Grievant reported to the Supervisor who reported to the Chief Information Officer. Grievant was not responsible for supervising any employees.

If the Governor shut down State agencies due to inclement weather, DOC security employees would have to report to a prison in furtherance of public safety. Grievant would not need to report to the Central Office when the Governor shut down State agencies.

The Agency has security personnel working in prisons who directly supervise inmates. Most of these employees wear uniforms and hold rank such as Corrections Officer, Corrections Sergeant, Corrections Lieutenant, Corrections Captain, and Corrections Major. Some security personnel are trained and

authorized to use weapons. Grievant did not supervise inmates, wear a uniform, or hold rank. He did not carry a firearm or O.C. spray while working.

Grievant's position did not require him to have "direct contact" with inmates on a daily basis. Inmates were not issued Agency cell phones and not permitted to have them. Grievant would not be in a position to provide services or assistance directly to an inmate as part of his job. Grievant did not transport inmates. He was not responsible for observing or reviewing inmate work. Any contact Grievant had with offenders would have been under the supervision or close observation of DOC security employees.

The Agency had an "Offender Phone System (GTL)" that was available to inmates at facilities. None of Grievant's duties involved the Offender Phone System. He did not have authorization from the Agency to access that application. Grievant has not worked on the Offender Phone System.

The Agency has several Correctional Facilities located throughout the Commonwealth. Most of these prisons are secured by a tall perimeter fence with razor-wire intended to keep inmates from escaping the prison. Inmates live in housing units inside the prisons. Many of these housing units have cells with doors that are locked and unlocked by a corrections officer sitting in a control booth not accessible to inmates. In order to enter the secured area of a prison, a visitor must pass through "shake down" where corrections officers search visitors for contraband. Once inside a prison, a visitor can only go into areas as permitted by corrections officers who open and close secured doors.

The Agency has its Central Office located in Richmond, Virginia. This headquarters is located in an office building without a fenced perimeter. Grievant worked in the Central Office.

To gain access to his desk in the Central Office, Grievant had to show his identification to a contractor employee at the building entry. He and his belongings were not searched when he entered the Central Office building.

Grievant worked on cell phones use[d] by other employees. If an employee's cell phone was not working properly, the employee would give the cell phone to Grievant and he would attempt to repair the phone. If Grievant needed to leave his desk, he would sometimes leave a customer's cell phone on his desk.

Inmates posing lowered security risks were transported from prisons to work at the Central Office and then returned to their prisons after work. For example, some inmates from a women's prison worked preparing and serving food in the Central Office cafeteria. Two other inmates performed maintenance work in the Central Office. Grievant worked from his office in the Central Office building. He was not involved in supervising any inmates in the Central Office or any inmates

in Agency correctional facilities. Non-employee authorized visitors to the Central Office would have the same access to the Central Office cafeteria as would any employee working in the Central Office.

Some Agency employees have been able to smuggle illegal drugs into prisons despite the Agency's search and security precautions. Bringing drugs into a correctional facility would be contrary to Agency policy and could result in criminal proceedings against the carrier. When Grievant entered a secured portion of a prison, he would be subject to the same search given to other employees and public visitors.

The Agency has a telecommunications circuit that is the "backbone" of the Agency's telecommunications system. This circuit connects employees with Agency applications such as email and VACORIS. In order to prepare reports explaining bandwidth usage, Grievant would have to have access to the telecommunications circuit. Some of Grievant's duties included special projects. For example, the Agency wanted to ensure separate telephone systems for its employees and inmates. If the Agency needed to shut down the phone system to a facility when inmates rioted, Grievant could be tasked to provide analysis on how to accomplish that task. Grievant did not have keys to data closets at facilities. To gain access to communications cables inside data closets, he would have to be given access by another employee.

The Agency had data network closets which consisted of network servers, routers, switches, and cables. Some of the cables provided access to the Internet.

Grievant had a special project when the Agency moved a Probation Office to another location. He was responsible for ensuring that bandwidth was moved to the new location without disconnecting it at the old location. He completed the task without leaving his office.

Grievant had a special project involving a "monitor refresh." He took new computer monitors to a different facility. He unpackaged the monitors and set them up for DOC employees to use. He retrieved the old monitors and brought them back to the Central Office.

Grievant had the authority to purchase items to perform his job duties. After obtaining approval from the Supervisor, he would obtain many items. With respect to purchasing cell phones for employees, however, he did not need the Supervisor's prior approval.

Grievant had not been advised he would be responsible for responding to an attempted inmate escape. The likelihood Grievant would be asked to help in response to an inmate escape was negligible.

> Grievant had access to the Agency's business-related information. He did not have access to any safety-sensitive or confidential information.
>
> Grievant was not responsible for operating heavy equipment. He was not required to have a commercial driver's license to operate Agency equipment.
>
> Grievant was not responsible for supervising or operating Agency physical infrastructure.

Based on these facts, the hearing officer determined that the grievant was not in a safety-sensitive job for Fourth Amendment purposes. As a result, the hearing officer determined that the agency's "attempt to randomly drug test Grievant was contrary to the Fourth Amendment" and, thus, the grievant "was not obligated to comply with the random drug search" and his "removal must be reversed."[2] 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 . . . ."[3] 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.[4] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[5] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that, although the hearing officer was required to "conduct[] a full Fourth Amendment analysis," the hearing decision contains "no findings of fact on several material issues" related to the agency's interest in conducting random drug tests. As examples, the agency contends that the hearing officer failed to account for the grievant's access to inmates and to other employees' phones, for the agency's need to keep drugs away from its inmate population, and for the grievant's notice that he would be subject to random drug tests.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[7] 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

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[2] *Id.* at 13.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see* Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.

circumstances to justify the disciplinary action.[8] 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.[9] 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.

Searches in "Safety-Sensitive" Positions

The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ."[10] In the context of public employment, random or suspicionless drug-testing is generally considered an unreasonable search in the absence of a "special need" that outweighs employees' reasonable privacy interests under the circumstances.[11] In the present matter, recognizing well-established precedent that public-safety considerations may rise to the level of a sufficiently compelling governmental interest under this standard, the Circuit Court held that, "[i]n order for the drug test to be constitutional in this instance, Grievant must have held a 'safety-sensitive' position with [the agency] that qualifies as an exception to the warrant requirement of the Fourth Amendment."[12] Thus, the Circuit Court remanded this matter to the hearing officer to determine whether the grievant held a "safety-sensitive job" that could justify a suspicionless search.[13]

The U.S. Supreme Court has held that regulating the conduct of certain employees in order to "ensure safety" may be a "special need" that can "justify departures from the usual warrant and probable-cause requirements" of the Fourth Amendment.[14] In *Skinner v. Railway Labor Executives Association*, the Court held that railway employees could be subject to mandatory suspicionless testing in order "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."[15] These employees' duties were "fraught with such

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[8] *Rules for Conducting Grievance Hearings* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] U.S. Const. amend. IV; *see also* Va. Const. art. I § 10.
[11] Chandler v. Miller, 520 U.S. 305, 313-14 (1997); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 624 (1989) ("In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); *see*, *e.g.*, AFSCME Council 79 v. Scott, 717 F.3d 851 (11th Cir. 2013) (executive order requiring drug-testing of all state employees violated the Fourth Amendment to the extent that the government could not show a special need for suspicionless testing).
[12] In support, the Circuit Court cited *Skinner*, 489 U.S. at 602, *Majewski v. Fischi*, 372 Fed. App'x 300, 303-04 (3d Cir. 2010), *Carroll v. City of Westminster*, 233 F.3d 208, 211 (4th Cir. 2000), and *Taylor v. O'Grady*, 888 F.2d 1189, 1196 (7th Cir. 1989).
[13] EDR interprets the Circuit Court's order to present a mixed question of law and fact for consideration upon remand: whether the evidence supported a conclusion that the grievant held a "safety-sensitive job" as that concept has been established in Fourth Amendment case law.
[14] *Skinner*, 489 U.S. at 620.
[15] *Id.* at 620-21.

risks of injury to others that even a momentary lapse of attention can have disastrous consequences," causing "great human loss before any signs of impairment become noticeable to supervisors or others."[16] Because individualized suspicion could fail to detect impairment before the impairment caused disaster, the Court reasoned that this usual requirement was not compatible with the special need to ensure safety under the circumstances.[17] The Court also considered that employees' reasonable expectation of privacy in their chosen line of work was reduced, given its high degree of regulation and safety-sensitive nature. In *National Treasury Employees v. Von Raab*, a companion case to *Skinner*, the Court applied a similar balancing test[18] to approve suspicionless drug testing for certain customs employees who were on the front lines of the nation's battle against drug smuggling,[19] as well as those employees whose positions required them to carry a deadly weapon.[20]

By contrast, in its later decision in *Chandler v. Miller*, the Court invalidated a state drug-test requirement for candidates for public office, emphasizing that the government is required to articulate a "substantial" interest necessitating suspicionless testing.[21] In that case, the Court concluded that the danger of unlawful drug users attaining high office appeared to be hypothetical, not real; thus, the need for candidates to certify negative drug-test results was "symbolic, not 'special.'"[22] The Court also reiterated that suspicionless testing is more likely to be constitutionally sound when individual scrutiny is impractical.[23] Unlike *Von Raab*, which presented a "unique context," the Court held that where "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."[24]

Applying these precedents to the corrections context, federal appellate courts have recognized a special government need to ensure that corrections officers who interact directly with inmates are not impaired or otherwise compromised by illegal drug use.[25] These decisions have

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[16] *Id.* at 629.
[17] *Id.* at 623-30.
[18] *Von Raab*, 489 U.S. at 665-66 (explaining that, in evaluating "special need" suspicionless testing, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context").
[19] *Id.* at 668-70 ("The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs."); *see id.* at 674 ("[T]he almost unique mission of the [U.S. Customs Service] gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty . . . .").
[20] *Id.* at 670-71; *see* Carroll v. City of Westminster, 233 F.3d 208, 211 (4th Cir. 2000) (recognizing the government's "compelling interest in ensuring that the judgment of armed officers is not impaired by the use of illegal narcotics").
[21] 520 U.S. 305, 318 (1997).
[22] *Id.* at 321-22.
[23] *Id.* at 321.
[24] *Id.* at 323; *see also Von Raab*, 489 U.S. at 678 (declining to automatically extend approval of suspicionless testing to customs employees not directly involved in drug interdiction and not required to carry a firearm); AFSCME Council 79 v. Scott, 717 F.3d 851, 877 (11th Cir. 2013) (suspicionless search not constitutionally applied to all employees irrespective of their duties and work context, but could be applied to specific positions deemed safety-sensitive); Nat'l Fed'n of Fed. Employees-IAM v. Vilsack, 681 F.3d 483, 493 (D.C. Cir. 2012) (Fourth Amendment analysis must consider position-specific responsibilities rather than general program features).
[25] *See* Washington v. Unified Gov't, 847 F.3d 1192 (10th Cir. 2017); Int'l Union v. Winters, 385 F.3d 1003 (6th Cir. 2004); Am. Fed'n of Gov't Employees v. Roberts, 9 F.3d 1464 (9th Cir. 1993); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989).

approved suspicionless searches for corrections officers who "come into contact with potentially violent prisoners";[26] who "deal with persons in a volatile environment peculiarly susceptible to drugs";[27] who have "direct and unsupervised contact with prisoners, 80 percent of whom have a history of drug abuse";[28] and even those who typically do not oversee inmates but may be required to do so sporadically or in "an emergency situation."[29]

In sum, in assessing on remand whether the grievant in this matter held a "safety-sensitive job" for Fourth Amendment purposes, the hearing officer should have made findings on material issues such as, but not necessarily limited to, the potential injury that could result from a "momentary lapse" in the grievant's attention, whether the grievant's position was directly related to enforcing anti-drug laws or policies, whether the grievant's job required him to be armed or to use potentially deadly force, and whether he had direct and/or unsupervised interactions with inmates.

Hearing Decision Findings

As relevant to the Fourth Amendment considerations discussed above, the hearing officer found that the grievant worked as a Telecom/Network Coordinator.[30] His responsibilities related to "network administration, performance monitoring, hardware support, project planning, and development of technical standards and policies."[31] Yet he did not have access to network applications related to inmate security (such as the agency's video surveillance program).[32] The grievant did not have supervisory responsibilities over other employees or inmates.[33] Unlike the agency's corrections officers who served as a security personnel, the grievant did not carry a firearm or wear a uniform.[34] The grievant

> would not be in a position to provide services or assistance directly to an inmate as part of his job. Grievant did not transport inmates. He was not responsible for observing or reviewing inmate work. Any contact Grievant had with offenders would have been under the supervision or close observation of [agency] security employees.[35]

When the grievant would enter "a secured portion of a prison, he would be subject to the same search given to other employees and public visitors."[36] If the agency experienced a security emergency, such as a prison riot, the grievant could be called upon to provide technical support,

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[26] *Taylor*, 888 F.2d at 1197.
[27] *Roberts*, 9 F.3d at 1468.
[28] *Winters*, 385 F.3d at 1012.
[29] *Washington*, 847 F.3d at 1200.
[30] Remand Decision at 2.
[31] *Id.* at 4.
[32] *Id.* at 3.
[33] *Id.* at 5-6.
[34] *Id.*
[35] *Id.* at 6.
[36] *Id.* at 7.

but he was not responsible for responding to security events such as an inmate escape.[37] The agency did not designate the grievant's job as a "sensitive" or "security" position.[38]

A review of the record finds evidentiary support for these findings. The grievant's Employee Work Profile described him as a Telecom/Network Coordinator with various responsibilities related to the agency's information technology systems and equipment; none of his Core Responsibilities included the care, custody, and control of inmates or implied any duty or training to use physical force of any kind as part of his job.[39] The grievant testified that he did not oversee inmates, did not transport them, did not carry a firearm, did not have access to the inmates' computer network, did not enter secure areas without being searched, and did not otherwise interact with inmates without supervision by a third party, beyond what a non-employee could do.[40]

Based on these findings, the hearing officer reasonably concluded that a "momentary lapse of judgment" by the grievant would have only minimal consequences for public safety – unlike the railway employees in *Skinner* whose impairment could cause substantial human loss before raising an individualized suspicion.[41] The hearing officer determined that, although the agency has a security interest in preventing drug smuggling,[42] the grievant's work did not involve weapons, drugs, or even the agency's security-related computer applications; instead, his duties were employee-focused and did not put him in regular proximity to inmates.[43] On those occasions when he did enter a secure area, he was searched for contraband and monitored.[44]

For these reasons, the hearing officer concluded:

> The Agency's need for drug testing of Grievant was not substantial. It was not important enough to override Grievant's privacy interest. The Agency's need was not sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion.[45]

The agency takes issue with the hearing officer's failure to "provide the grounds [in the record] for certain findings of fact." However, while the hearing decision did lack specific record citations for certain findings,[46] EDR does not generally consider a lack of citations to be a basis for remand

[37] *Id.*
[38] *Id.* at 12.
[39] *See* Agency Remand Ex. 2.
[40] *See* Remand Hearing Recording at 31:30-34:25, 2:04:30-2:07:45, 2:13:20-2:19:40 (Grievant's testimony). The grievant's testimony in this regard was largely undisputed.
[41] *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 629 (1989)..
[42] Remand Decision at 7.
[43] *Id.* at 10-12.
[44] *Id.* at 10-11.
[45] *Id.* at 13.
[46] In its request for administrative review, the agency identifies two specific findings of fact that it claims are unsupported by the record; namely, that the grievant did not have access to confidential information and that the agency's own security employees would have supervised any contact the grievant had with inmates. *See* Request for Administrative Review at 8-9. However, in the absence of safety-related duties not amenable to individualized-suspicion testing, EDR's review of the record does not suggest that either the grievant's access to restricted information or proximity to inmates supervised by the Department of General Services could independently support

where, as here, the record on administrative review contains facts to support the hearing officer's conclusions.

The agency raises multiple substantive objections to the hearing decision. First, the agency points to the absence "of any case or other authority where access to inmates, even as limited as that claimed by [the grievant], did not outweigh the employee's privacy interest where, as here, the employee also had access to his co-worker's cell phone, mobile devices, and e-mail."[47] While we agree that the relevant case law recognizes strong safety interests in the corrections context, these cases also uniformly dealt with employees who had at least some correctional duties involving direct oversight of inmates, such as transportation or providing contingent security. The hearing officer found that the grievant did not have such duties, and the agency does not appear to dispute the extent of the grievant's access to inmates. Similarly, the agency suggests that the hearing officer failed to consider whether the grievant had a reduced privacy interest by virtue of his voluntary employment in a corrections context, wherein he acknowledged that his position would be subject to random drug testing.[48] However, EDR is not aware of a case, and the agency cites to none, in which a court has recognized a reduced expectation of privacy justifying a suspicionless search without demonstration of an independent "special need" for the search in the first place.

The agency's primary objection, broadly stated, involves its asserted "special need" and the hearing officer's consideration of the evidence on that point. Specifically, the agency contends that the hearing officer's findings failed to account for its "special need to keep drugs away from its inmate population and to minimize the risk that its employees could be compromised by an offender."[49] The agency points to evidence that inmates' access to illicit drugs causes overdoses and deaths and also creates a risk that inmates can manipulate employees' actions by way of the employees' own drug use. For example, the agency cites a policy provision establishing all employees' "responsibility to protect public safety," including by maintaining a work environment "where internal security is not jeopardized by fellow employees who engage in illegal or unlawful drug usage, or are under the influence of alcohol."[50] The agency also points to testimony by its Chief of Corrections Operations, said to describe the agency's purposes of

> upholding the public trust, minimizing the risk that employees or contractors with access to inmates could be subverted or blackmailed into gang activity by offenders (a concern based on specific past examples), and ensuring that employees or contractors with access to certain types of valuable information (even something as simple as knowing security processes and procedures) are not compromised by drug use into passing that information along to offenders for unlawful purposes.[51]

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a "safety-sensitive" designation. Accordingly, even assuming that the cited findings lacked record support, any such error would appear to be harmless and not a basis for remand.

[47] Request for Administrative Review at 5.

[48] *Id.* (citing Carroll v. City of Westminster, 233 F.3d 208, 211, 212 (4th Cir. 2000)).

[49] Request for Administrative Review at 5.

[50] *Id.* at 6.

[51] *Id.* at 7.

The high stakes of its general anti-drug efforts, the agency argues, are a material issue for the Fourth Amendment analysis and were insufficiently addressed by the hearing officer.

However, as explained above, courts have required government entities to make particularized showings as to why specific positions should be exempt from normal protections against suspicionless searches.[52] Here, assuming that the agency as a whole must manage serious drug-related dangers that are real and not "hypothetical,"[53] EDR's review of the record and submissions on appeal does not suggest that the hearing officer neglected evidence as to how these dangers implicate the grievant's specific duties – other than by sole virtue of his employment with the agency – such that his position could be considered "safety-sensitive" under Fourth Amendment precedents.[54] Although the agency presented substantial evidence of its strong safety interest in keeping drugs out of its facilities, the examples presented for administrative review (standard policy language, the general problem of gang influence in prisons, an information technology contractor caught bringing cocaine into a prison) do not elucidate why *suspicionless* testing is necessary for an employee in the grievant's position – beyond the entry search apparently required of all prison visitors, including the grievant.[55] While the agency also notes testimony regarding the potential dangers of inmates' access to the internet,[56] its request for review does not cite, and EDR's review of the record does not reveal, evidence to suggest that the nature of the grievant's position would have allowed him to arrange for such access.

In consideration of the foregoing, EDR cannot conclude that the hearing officer erred in not addressing such issues more fully in his decision. Indeed, by considering in detail whether the grievant held a "safety-sensitive job," as directed by the Circuit Court, the hearing officer necessarily evaluated whether the evidence tended to show a "special need" to drug-test employees like the grievant in the absence of any individualized suspicion. While the agency objects that the hearing decision does not capture the extent of its evidence about the dangers of drugs to correctional facilities, there is no requirement under the grievance procedure that a hearing officer specifically discuss each aspect of the parties' evidence presented at a hearing. Thus, mere silence as to particular testimony and/or other evidence does not necessarily constitute a basis for remand. In addition, it is squarely within the hearing officer's discretion to determine the weight to be given to the evidence and arguments presented.[57] Here, while acknowledging that the agency must devote resources to the challenge of preventing drug smuggling, the hearing officer made extensive findings on the nature of the grievant's position and work activities within the agency. In light of

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[52] *Chandler*, 520 U.S. at 323; Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 678 (1989); AFSCME Council 79 v. Scott, 717 F.3d 851, 877 (11th Cir. 2013); Nat'l Fed'n of Fed. Employees-IAM v. Vilsack, 681 F.3d 483, 493 (D.C. Cir. 2012).
[53] *Chandler*, 520 U.S. at 319.
[54] Indeed, the agency's drug-testing policy subjects "[a]ll wage, full and part time salaried employees" to random testing. Agency Remand Ex. 5, at 9.
[55] Request for Administrative Review at 7-8. It appears that such an entry search allowed the agency to intercept the above-mentioned cocaine brought to a prison by an information technology contractor. *See* Agency Remand Ex. 6.
[56] Request for Administrative Review at 8, n.3 (referencing an incident that allegedly occurred in a different state).
[57] For example, in considering testimony from the agency's Chief of Corrections Operations, the hearing officer had discretion to assign relatively little weight to this evidence as probative of how the grievant's duties implicated public safety. Upon a thorough review of the record, EDR perceives no indication that the hearing officer abused his discretion in his consideration of any witness testimony on the material issues.

the Circuit Court's instructions on remand, EDR cannot say that the hearing decision in this regard reflects any error or other noncompliance with the grievance procedure.

Because the hearing officer made findings of fact and conclusions of policy in accordance with the Circuit Court's mandate to consider whether the grievant's position was "safety-sensitive," and because these findings are supported by evidence in the record, EDR has no basis in the record to disturb the decision. EDR acknowledges that the issues on which this case turn are mixed questions of fact and law. While EDR has addressed these matters, it does so as a matter of the grievance procedure. Whether the hearing officer has determined the legality of the agency's actions is ultimately a question to be addressed by legal appeals to the appropriate court should the parties pursue such appeals. Further, EDR is not called upon to address whether there are other unstated bases to show that the grievant was in a "safety-sensitive" position. Whether there are such other bases given the nature of the grievant's position cannot be addressed in this ruling if they were not raised at hearing or part of the record. Consequently, EDR's review of this matter is necessarily confined to the issues presented at hearing on the question remanded from the Circuit Court.

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.[58] 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.[59] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[60]

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