

Issue: Administrative Review of Hearing Officer's Decision in Case No. 10858; Ruling  
Date: November 29, 2016; Ruling No. 2017-4439; Agency: Department of  
Corrections; Outcome: Remanded to AHO.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2017-4439  
November 29, 2016

The Department of Corrections (the “agency”) has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s decision in Case Number 10858. For the reasons set forth below, EDR remands the case to the hearing officer for reconsideration and clarification.

FACTS

The relevant facts in Case Number 10858, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Corrections employs Grievant as a Trainer/Instructor II at one of its facilities. He began working for the Agency in March 2013. Grievant taught electrician skills to inmates. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had dental surgery in March 2015 and June 2015. He received prescription medication consisting of Amoxicillin and Penicillin. He took Advil to relieve pain in lieu of prescription medication. Grievant purchased Advil in a large container of 250 or 500 pills. His practice was to remove the Advil from the large container and place it in an empty prescription bottle so he could carry it with him.

In March and June 2015, Grievant took his prescribed medication into the Facility and an Advil in his wife’s empty prescription bottle. He passed through the Agency’s security gate at the Facility’s sally port. A Corrections Officer searched Grievant and reviewed the contents of his belongings. The Corrections Officer permitted him to enter the Agency’s secured area so he could go to his work area.

Grievant worked at a desk in the Building which is inside the Facility’s secured (fenced) perimeter. Grievant’s desk had an approximately six inch thick red line drawn on the floor around his desk. The red line indicated that it was a restricted area that inmates could not cross. If an offender crossed the red line, the offender could be charged with an inmate offense. If Grievant was not in the room

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<sup>1</sup> Decision of Hearing Officer, Case No. 10858 (“Hearing Decision”), October 12, 2016, at 2-3 (citation omitted).

looking towards his desk, an inmate could open his desk drawer and obtain items inside the drawer.

On May 3, 2016, the Agency's strikeforce team conducted a search of the Facility. They searched Grievant's classroom including his desk. The desk drawer was not locked. They opened the desk drawer and observed three prescription bottles.

The first prescription bottle had a label showing Grievant's name, a date filled of June 16, 2015 and the medicine of Penicillin. It showed a discard date of October 13, 2015. The label read, "Take 1 Tablet by Mouth Four Times A Day Until Finished. Start This One Day Prior to Surgery. Inside the bottle were four Penicillin pills.

The second bottle was empty but showed a label with the name of Grievant's wife but the name was marked over with a black marker. The label showed the bottle was for an anti-depressant medicine. The bottle showed the pills were to be discarded after August 6, 2015. When Grievant brought the bottle into the Facility, he had an Advil inside the bottle.

The third bottle was empty and had a label showing Grievant's name, a date filled of March 22, 2015 and the medicine of Amoxicillin. The bottle showed a discard date of March 22, 2016.

Grievant knew the strikeforce search was scheduled to take place. He did not remove the pill bottles because he had forgotten he placed them in his desk. He had been through other strikeforce searches without the strikeforce teams locating or objecting to the pill bottles.

The Facility has a vending machine for employees allowing them to purchase pain relievers in individual packets.

Offenders at the Facility are allowed to have their own prescribed medicine with them as long as it is "on their person."

On June 20, 2016, the grievant was issued a Group III Written Notice with a thirty calendar-day suspension for introducing or attempting to introduce contraband into the facility.<sup>2</sup> The grievant timely grieved the disciplinary action<sup>3</sup> and a hearing was held on September 22, 2016.<sup>4</sup> In a decision dated October 12, 2016, the hearing officer assessed the evidence and determined that the grievant engaged in unsatisfactory work performance by failing to remove the Penicillin pills and the Amoxicillin bottle from his desk and that he failed to follow policy by using his wife's prescription bottle to carry Advil into the facility.<sup>5</sup> The hearing officer reduced

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<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> See Hearing Decision at 1.

<sup>5</sup> *Id.* at 3-5.

the discipline to a Group II Written Notice with an eight workday suspension.<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup>

Fairly read, the agency’s request for administrative review disputes the hearing officer’s determination that the grievant’s conduct constituted unsatisfactory work performance and a failure to follow policy, and thus argues that his decision to reduce the Group III Written Notice to a Group II Written Notice was not supported by the evidence in the record. Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>9</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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 claims that “[l]eaving the pills unsecured inside the Grievant’s desk” was conduct that warranted the issuance of a Group III Written Notice for “[v]iolating safety rules where there is a threat of physical harm” and/or “[g]ross negligence on the job that results (or could have resulted) in the . . . death[] or serious injury of a ward of the State . . . .” EDR has identified no evidence in the hearing record, and most importantly in the Written Notice itself,<sup>13</sup> to indicate that the grievant was charged with, or received notice that he had been charged with, violating either of the policy provisions cited by

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<sup>6</sup> *Id.* at 6. In calculating the appropriate period of suspension for the Group II Written Notice, the hearing officer noted that the agency “suspended Grievant for 30 calendar days,” and thus he “utilize[d] calendar days instead of workdays to measure the period of suspension,” determining that “[a] period of ten calendar days would amount to eight work days in Grievant’s case.” *Id.* at 5.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> Va. Code § 2.2-3005.1(C).

<sup>10</sup> *Grievance Procedure Manual* § 5.9.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>12</sup> *Grievance Procedure Manual* § 5.8.

<sup>13</sup> Agency Exhibit 1.

the agency as justification for a Group III Written Notice in its request for administrative review. The Written Notice only states that the grievant had been charged with introducing contraband into the facility.<sup>14</sup> While other bases for discipline could have been applicable in this case, Section VI(B) of EDR's *Rules for Conducting Grievance Hearings* (the "Rules") provides that in every instance, an "employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge."<sup>15</sup> EDR's rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer.<sup>16</sup> In addition, the *Rules* provide that "[a]ny challenged management action or omission not qualified" cannot be remedied through a hearing."<sup>17</sup> Under the grievance procedure, charges not set forth on the Written Notice cannot be deemed to have been qualified, and thus are not before a hearing officer.

In this case, there is no evidence in the record to suggest that the grievant had notice of any charge against him other than introducing contraband into the facility. While there was some evidence at the hearing to show how the grievant's conduct could have put offenders at risk,<sup>18</sup> EDR's review of the hearing record indicates that this evidence was presented to demonstrate why contraband is prohibited in the agency's facilities, not to show that the grievant himself had put offenders at risk in the manner suggested by the agency in its request for administrative review as a violation of a safety rule or to define the grievant's conduct as gross negligence. Accordingly, EDR finds no error in the hearing officer's consideration of the evidence with respect to the claim and will not disturb the decision on this basis.

The agency also asserts that the hearing officer "misinterpreted the Agency's policy on contraband" and failed to consider evidence in the record that, even if the grievant was permitted to carry a one-day dose of Penicillin into the facility when it had been prescribed to him, the Penicillin became contraband when the grievant failed to remove it from his desk. In addition, the agency further argues that the hearing officer did not consider whether the grievant's wife's empty prescription bottle was itself contraband, even if his use of the bottle to carry a daily dose of Advil into the facility was properly considered a failure to follow policy warranting a Group II Written Notice.

In the hearing decision, the hearing officer stated as follows with regard to the Penicillin the grievant carried into the facility:

The Agency argued that Grievant's possession of the four Penicillin tablets showed [sic] he Grievant introduced or attempted to introduce contraband into the Facility. At the time Grievant brought the Penicillin into the Facility, it was not contraband. The pills were not forbidden for entry, possession, or removal from the Facility. He was permitted to bring a container clearly marked with his name and prescription along with one day's dose. A day's [sic] does was four pills. The

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<sup>14</sup> *Id.*

<sup>15</sup> *Rules for Conducting Grievance Hearings* § VI(B) (citing *O'Keefe v. United States Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002)(holding that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply.")).

<sup>16</sup> *See, e.g.*, EDR Rulings Nos. 2007-1409; EDR Ruling No. 2006-1193; EDR Ruling No. 2006-1140.

<sup>17</sup> *Rules for Conducting Grievance Hearings* § I.

<sup>18</sup> *E.g.*, Hearing Recording at 28:34-29:12 (testimony of Witness H).

Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice.<sup>19</sup>

There is evidence in the record to support a conclusion that the grievant brought a one-day dose of Penicillin into the facility when it had been prescribed to him following a medical procedure,<sup>20</sup> and that this was permissible under agency policy.<sup>21</sup> However, EDR is unable to determine whether the hearing officer considered and explicitly addressed the evidence in the record relating to the agency's argument that the Penicillin became contraband when it was not removed from the grievant's desk.<sup>22</sup> At the hearing, for example, one witness testified that an otherwise acceptable one-day dose of Penicillin would become contraband if not consumed or carried out of the facility at the end of the day in which it was brought in.<sup>23</sup> Another witness testified that a one-day dose of medication may be brought into the facility, so long as it is current and in its original container, but it has to be taken out of the facility on the same day.<sup>24</sup>

With regard to the grievant's use of his wife's prescription bottle, the description of the offense described in the Written Notice states that he "brought in a prescription bottle which was originally labeled for his wife," and that the grievant was "not authorized to utilize, nor introduce his wife's prescription bottle into the compound . . . ."<sup>25</sup> At the hearing, a witness testified that empty prescription bottles are considered to be contraband and should not be left in the facility.<sup>26</sup> In the hearing decision, the hearing officer discussed the grievant's use of his wife's pill bottle as follows: "Grievant brought an Advil into the Facility in a container that originally held many pills for his wife. The Advil was not in a small individual packet as required by policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice."<sup>27</sup> While the hearing officer considered the grievant to have violated a policy by having his wife's pill bottle in his desk, the agency's contention that the grievant introduced contraband into the facility in the form of this bottle, regardless of the contents, was not explicitly addressed in the hearing decision.

It may be that the hearing officer did not discuss the evidence about the Penicillin or the grievant's wife's pill bottle (and the associated application/interpretation of the agency's policy) because he did not find that it was sufficient to demonstrate the grievant had introduced or attempted to introduce contraband into the facility. However, EDR cannot determine whether the hearing officer considered the evidence in the record relating to these issues in making his decision. Accordingly, the case must be remanded to the hearing officer for further consideration and explanation of the evidence discussed above, relating to whether the Penicillin

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<sup>19</sup> Hearing Decision at 4-5.

<sup>20</sup> Hearing Recording at 1:23:34-1:23:51, 1:32:45-1:32:59 (testimony of grievant).

<sup>21</sup> Agency Exhibit 3 at 17.

<sup>22</sup> The decision appears to state that the grievant was not forbidden from having "possession" of the Penicillin in the facility, *see* Hearing Decision at 5, but this brief reference does not clearly indicate whether the hearing officer considered or addressed the agency's argument that the Penicillin later became contraband by remaining in the grievant's desk for a period of time.

<sup>23</sup> Hearing Recording at 1:02:18-1:03:04 (testimony if Witness H).

<sup>24</sup> *Id.* at 1:09:35-1:09:34-1:09:57 (testimony of Witness C).

<sup>25</sup> Agency Exhibit 1 at 1.

<sup>26</sup> Hearing Recording at 21:35-22:17 (testimony of Witness H).

<sup>27</sup> Hearing Decision at 5.

(because it was not removed from the grievant's desk) or the grievant's wife's prescription bottle were contraband.<sup>28</sup>

### CONCLUSION AND APPEAL RIGHTS

This case is remanded to the hearing officer for further consideration of the evidence in the record to the extent discussed above. Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original decision).<sup>29</sup> Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the remand decision.<sup>30</sup>

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>31</sup> 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.<sup>32</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>33</sup>



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<sup>28</sup> This remand should in no way be interpreted to mean that EDR considers the record evidence sufficient to meet the agency's burden. Rather, these questions are obviously central to the disciplinary action in this case and, consequently, must be clearly considered and addressed by the hearing officer, to the extent they have not been already.

<sup>29</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

<sup>30</sup> See *Grievance Procedure Manual* § 7.2.

<sup>31</sup> *Id.* § 7.2(d).

<sup>32</sup> Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

<sup>33</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).