Issue: Administrative Review of Hearing Officer's Decision in Case No. 10864; Ruling Date: December 15, 2016; Ruling No. 2017-4445; Agency: Department of Corrections; Outcome: AHO's decision affirmed.

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 2017-4445
December 15, 2016

The Department of Corrections ("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 10864. For the reasons set forth below, EDR has no basis to disturb the decision of the hearing officer.

FACTS

The grievant is employed as a Senior Correctional Officer by the agency.[1] On June 28, 2016, the grievant was issued a Group II Written Notice, with a three day suspension, for "continu[ing] to display a pattern of unprofessional behavior and/or communication . . . constitut[ing] unsatisfactory performance as her behavior is verbally abusive towards staff and offenders which violates Operating Procedures 135.1 and 135.2."[2] The grievant timely grieved the disciplinary action and a hearing was held on October 7, 2016.[3] On October 26, 2016, the hearing officer issued a decision reducing the Group II Written Notice to a Group I Written Notice and reversing the grievant's suspension.[4] The agency has now requested administrative review of the hearing officer's decision.

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 . . . ."[5] 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 action be correctly taken.[6]

Inconsistency with Policy

In its request for administrative review, the agency asserts that the hearing officer's decision is inconsistent with policy. The agency argues that the grievant was issued disciplinary action based upon two separate incidents that violated agency policy, but that the hearing officer

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[1] Agency Exhibit 2.
[2] Agency Exhibit 1.
[3] *See* Decision of Hearing Officer, Case No. 10864 ("Hearing Decision"), October 26, 2016, at 1.
[4] *Id.* at 1, 4.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).

inappropriately reduced the disciplinary action from a Group II Written Notice for violation of policy to a Group I Written Notice for unsatisfactory performance. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The agency has requested such a review by DHRM. That request has been addressed in a DHRM policy review already, which upheld the hearing officer's decision. Accordingly, the agency's policy claims will not be discussed in this ruling, except to the extent the issues are related to the grievance procedure and addressed below.

Hearing Officer's Consideration of the Evidence

The agency's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the evidence *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.[10] 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.[11] 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.

First, the agency argues that the hearing officer erred in finding that the agency did not prove misconduct occurred during an incident in May 2016 when the grievant allegedly used abusive language and gestures towards inmates in the day room. The agency asserts that the testimony of the Assistant Warden, the video recording of the incident, and written complaints from the inmates did prove, by a preponderance of the evidence, that the disciplinary action issued was warranted and appropriate. In response, the grievant denies that she used abusive words or gestures and states that, on the day in question, she was only pointing to provide direction as to where the inmates should be seated.[12]

In this instance, the hearing officer found the grievant's explanation of events to be credible, noting that:

> The video of the incident shows Grievant standing approximately eight to ten feet away from the inmates and gesturing at them. The video does not contain audio. The Agency's evidence is based on inmate accounts who did not testify during the

[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] *See* Hearing Recording at 01:09:05 through 01:09:40, 01:10:34 through 01:11:15.

> hearing. The evidence is insufficient for Hearing Officer to conclude Grievant behaved inappropriately on May 24, 2016. The Agency alleged but did not prove that Grievant used abusive language. Speaking to inmates from a distance of eight to ten feet instead of walking up next to them does not form a basis for disciplinary action in a prison setting. Grievant's gestures were not so unusual as to justify disciplinary action.[13]

Determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. A review of the hearing record in its entirety demonstrates that the hearing officer based his findings upon information from the only person present at the hearing who provided a first-hand account of the incident in question.[14] While the agency correctly points out that it did provide as evidence written statements from inmates and testimony from the Assistant Warden who reviewed the video of the incident, nevertheless, it is the responsibility of the hearing officer to determine the appropriate weight given to each piece of evidence presented in rendering a decision. Pursuant to the *Rules for Conducting Grievance Hearings* (the "*Rules*"), "[t]he purpose of liberal admission [of evidence] is to allow the introduction of evidence that might not be admissible under evidentiary rules, not to encourage the substitution of less reliable evidence for more reliable evidence."[15] Here, the hearing officer considered the agency's evidence as to the May 2016 incident but explicitly stated that he found it insufficient to prove misconduct.[16] Because 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. Accordingly, EDR declines to disturb the decision on this basis.

Further, the agency argues that the hearing officer erred by reducing the disciplinary action from a Group II Written Notice to a Group I Written Notice. The agency asserts that the hearing officer should have given deference to the agency's classification of the offense and reasserts its position that the grievant's conduct as described in the Written Notice constituted a Group II offense for failure to follow policy. Specifically, the agency argues that the grievant's behavior violated the agency's policies governing general standards of conduct (Operating Procedure 135.1) as well as conduct toward offenders (Operating Procedure 135.2).

The Virginia Code sets forth the powers and duties of a hearing officer, providing that the hearing officer may order appropriate remedies, to include "mitigation or reduction of the agency disciplinary action. . . ."[17] Implicit in the hearing officer's statutory authority is the ability to determine whether the employee's alleged conduct justified the discipline. EDR has held that the hearing officer has an independent duty to assess the level of discipline,[18] based upon the provision in the *Rules* stating that:

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[13] Hearing Decision at 3.
[14] *See* Hearing Recording at 01:09:05 through 01:09:40, 01:10:34 through 01:11:15.
[15] *Rules for Conducting Grievance Hearings* § IV(D).
[16] Hearing Decision at 3.
[17] Va. Code § 2.2-3005.1(A).
[18] *See* EDR Ruling 2010-2388.

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[19]

Thus, a hearing officer must always determine whether the level of discipline issued conforms to policy, that is, was properly characterized as a Group I, II or III.

In this instance, the hearing officer assessed the behavior as described in the Written Notice, but found that the misconduct described did not rise to the level of a Group II offense.[20] Specifically, the hearing officer determined that the grievant's work performance on June 3, 2016 was unacceptable to the agency, thereby justifying the issuance of a Group I Written Notice for unsatisfactory performance. The hearing officer's analysis is not unreasonable given the description of the grievant's conduct on the Written Notice, which stated that she had displayed "a pattern of unprofessional behavior and/or communication" that "constitutes unsatisfactory performance." Unsatisfactory performance is typically a Group I offense.[21]

While the agency is correct that the hearing officer's decision did not specifically state whether the grievant's conduct violated Operating Procedure 135.2, nevertheless, it is apparent that the hearing officer considered the agency's classification of offenses under applicable agency policy[22] and the agency's assertions as to why it issued a Group II Written Notice,[23] ultimately finding that the agency's characterization of the behavior as a Group II offense was not supported by the facts of the case. It is not clear that even had the hearing officer found a violation of Operating Procedure 135.2 that such a violation of policy could support a Group II Written Notice given the specific nature of the grievant's behavior and how it was characterized by the agency. Ultimately, however, these questions are more properly determined in a DHRM policy review.

In its December 9, 2016 policy review of this matter, DHRM concluded that the hearing officer's decision was "based on his assessment of the evidence" and found no reason to believe that his findings were inconsistent with policy.[24] Thus, any error in failing to specifically mention Operating Procedure 135.2 in the hearing decision is harmless, as it is evident that the

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[19] *Rules* at VI(B), (emphasis added).
[20] Hearing Decision at 3.
[21] DHRM Policy 1.60, *Standards of Conduct*, § B(2)(a), & Attach. A; DOC Operating Procedure 135.1 ¶ VI(B).In addition, the offense codes selected by the agency were unsatisfactory performance and obscene or abusive language, both of which are also typically disciplined at the Group I level. *See id.*
[22] The hearing decision cited to specific provisions of Operating Procedure 135.1. *See* Hearing Decision at 3.
[23] *Id*.
[24] Policy Ruling of the Department of Human Resource Management, Case No. 10864, Dec. 9, 2016, at 5.

hearing officer did consider whether the sustained charges supported the Group II Written Notice, finding that they could not support more than a Group I offense. Such a determination is within the hearing officer's authority and, importantly, no error under policy was found by the DHRM policy review. Consequently, EDR has no basis to intervene in the decision.

CONCLUSION AND APPEAL RIGHTS

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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