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SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5022
January 8, 2020

The Department of Corrections ("the agency") has requested that the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's reconsideration decision in Case Number 11346-R. For the reasons set forth below, EDR will not disturb the reconsideration decision.

FACTS

The relevant facts in Case Number 11346, as found by the hearing officer, were recited in EDR's first administrative review in this matter, and they are incorporated herein by reference.[2]

On March 15, 2019, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for "failure to report fraternization/computer misuse."[3] Following a grievance hearing, the hearing officer issued a decision upholding the grievant's removal[4] but observing that the grievant had been "poorly trained" on the relevant agency policies.[5]

Following the grievant's request for administrative review, EDR remanded the hearing decision for reconsideration by the hearing officer.[6] As an initial matter, EDR concluded that "the hearing officer's findings of fact regarding the grievant's relevant acts and omissions are

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[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] EDR Ruling No. 2020-4996, at 1-3 (citing Decision of Hearing Officer, Case No. 11346 ("Hearing Decision"), July 22, 2019, at 2-3).

[3] Agency Ex. 1, at 1 (citing Operating Procedures 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*, and 310.3, *Offender Access to Information Technology*); *see* Agency Exs. 5, 7.

[4] Hearing Decision at 5.

[5] *Id.* at 5; *see generally* Agency Exs. 6, 7.

[6] *See* EDR Ruling No. 2020-4996.

based upon record evidence and therefore may not be disturbed."[7] However, EDR found that the hearing decision had not "address[ed] the role, if any, of fraternization or OP 135.2 in the agency's disciplinary action."[8] In addition, EDR found evidentiary "support for the hearing officer's conclusion that . . . the grievant was 'poorly trained' as to the prohibition on allowing inmates to use internet-connected equipment."[9] EDR's ruling clarified that a hearing officer is not required to presume sufficient notice of written rules "where the relevant policy requirements are contradictory, exceedingly inconspicuous, and/or reliant on specialized or technical language in which the employee lacks training or expertise."[10] Thus, EDR remanded the case to the hearing officer "to determine (1) whether a presumption of adequate notice should govern in this case; (2) if not, whether constructive notice was deficient to the point of being a mitigating circumstance; and (3) if so, whether the mitigating circumstances in total are sufficient to warrant reduction of the agency's disciplinary action in this case."[11]

On November 20, 2019, the hearing officer issued a reconsideration decision[12] that reiterated his previous conclusion that the grievant was "poorly trained" on the agency's policies as to inmate computer access.[13] Declining to presume that the grievant had adequate notice of those policies, the hearing officer concluded that notice was deficient such that, in light of all the surrounding facts and circumstances,[14] the Group III Written Notice with removal must be reversed. Further, the hearing officer concluded that the agency had failed to prove that the grievant knew that the conduct he observed could constitute fraternization that must be reported under OP 135.2.[15]

The agency has requested that EDR administratively review the reconsideration 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."[16] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the

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[7] *Id.* at 4. These findings included "that the Inmate regularly used the Lieutenant's internet-connected computer and that the grievant saw the Inmate do so on two occasions. Each time, the grievant questioned the Lieutenant to ensure that he was not permitting the Inmate to use the internet. The hearing officer did not find that the grievant took any further action after verifying that the Inmate was not using the internet and was only assisting the Lieutenant in his job duties as his clerk." *Id.* at n.16 (citiations omitted).
[8] *Id.* at 5.
[9] *Id.* at 6.
[10] *Id.* at 9.
[11] *Id.* at 10.
[12] Reconsideration Decision of Hearing Officer, Case No. 11346-R, Nov. 20, 2019.
[13] *Id.* at 4.
[14] *Id.* (citing the grievant's action "to reduce the likelihood of any harm to the Agency," positive performance history, absence of previous disciplinary action, and likelihood of following the agency's rules in the future without deterrence measures).
[15] *Id.* at 5.
[16] Va. Code §§ 2.2-1202.1(2), (3), (5).

noncompliance.[17] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[18] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency presents several challenges to the reconsideration decision. The agency asserts that it "provided [the grievant] with ample training, opportunities, and experience for him become fully aware of the expectations and requirements" with respect to information security. The agency maintains that the grievant observed behavior – *i.e.*, a Lieutenant allowing the Lieutenant's inmate clerk to perform work duties using the Lieutenant's agency laptop – that violated not only agency policy but also common sense. In addition, the agency argues that the hearing officer erred by not considering aggravating circumstances justifying the discipline. Finally, the agency contends that the hearing officer exceeded his authority by effectively changing the agency's policy.

Lack of Notice

In its first administrative review, EDR determined that the hearing officer's findings of fact were supported by evidence in the record, as was his conclusion that the grievant was "poorly trained" regarding the applicable rules related to information security.[19] The hearing officer's factual determinations regarding the record evidence about the training (or lack thereof) the grievant received on the relevant matters in this case are, therefore, not susceptible to being overturned on administrative review. Thus, to the extent that the agency's arguments challenge these determinations, EDR will not reconsider these issues upon its second review.[20] In addition, for the reasons addressed in its prior ruling, EDR will not disturb the hearing officer's determination in the reconsideration decision that OP 310.2 and OP 310.3 are "contradictory" and/or "poorly written, organized in a confusing manner, and directed primarily at the Agency's Technology Services Unit and not security staff like Grievant."[21] Thus, the hearing officer could reasonably conclude that the grievant's conduct occurred in "[t]he absence of actual and constructive notice of the Agency's policies . . . ."[22]

The agency maintains that "common sense" also would dictate against letting an inmate use an internet-connected employee laptop.[23] However, as explained in EDR's prior ruling, some provisions of OP 310.3 do contemplate inmate access to IT resources and to the internet, especially in the work context.[24] Here, the Inmate worked as a clerk for the Lieutenant. While the

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[17] *See Grievance Procedure Manual* § 6.4(3).
[18] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[19] *See* EDR Ruling No. 2020-4966, at 6-7.
[20] *See Grievance Procedure Manual* § 7.2(c) ("Administrative review decisions are final and nonappealable.").
[21] Reconsideration Decision at 4; *see* EDR Ruling No. 2020-4966, at 8-9.
[22] Reconsideration Decision at 4.
[23] Request for Administrative Review at 2. The agency contends that the hearing officer's conclusions of policy are based on a "misunderstanding of [OP 310.3] and the Agency's business practices." *Id.*
[24] *See* EDR Ruling No. 2020-4966, at 8; Agency Ex. 7 at 2 ("Offenders shall only be permitted to use IT resources to perform approved job assignments . . . ."); *id.* at 3 ("Offender internet access shall be strictly controlled and monitored at all times."); *id.* at 4 ("supervisors must . . . provide clear instruction on the expectations regarding internet use, including how and when [offenders] can navigate and which sites they may access.").

agency may reasonably point to evidence that the Inmate was poorly supervised in this role, this charge departs from the conduct cited on the Written Notice: "failure to address and report a subordinate employee who allowed an offender to utilize his state computer."[25] Thus, EDR perceives no error in the hearing officer's finding that the grievant lacked adequate notice that the agency categorically prohibited the computer use he observed.

As a result, the remaining issues meriting discussion in this second administrative review are whether the record supports the hearing officer's determinations, upon reconsideration, that (1) the agency failed to prove misconduct under OP 135.2, and (2) the Written Notice, based on a computer-misuse violation, must be mitigated.

Fraternization

At the hearing, the agency had the burden to prove the misconduct charged – that the grievant "fail[ed] to report fraternization/computer misuse."[26] As directed by EDR's prior ruling, the reconsideration decision included findings as to whether misconduct under OP 135.2 occurred. Specifically, the hearing officer found that "Grievant did not observe the Lieutenant fraternizing with the Inmate" and, thus, "Grievant did not fail to report abuse, fraternization, hazing, or sexual misconduct because he did not observe any such behavior."[27] These findings are supported by facts in the record. The grievant offered undisputed testimony that he witnessed the Inmate on the Lieutenant's computer only under direct supervision, engaged in work as the Lieutenant's clerk, and not using the Internet.[28] Under these circumstances, the grievant was not aware that he was witnessing policy violations that he was required to report.[29]

The agency maintains that the grievant knew or should have known that the Inmate's use of the Lieutenant's computer for work purposes violated OP 135.2 because it both compromised security and was a special privilege.[30] However, 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. Here, the agency's evidence did not require a finding that the grievant failed to report a security issue. The grievant observed that the Inmate appeared to be doing work for the Lieutenant under the Lieutenant's direct sight supervision, and he verified that the Inmate was not accessing the internet. In addition, the record does not necessarily establish that the Inmate's computer access, as observed by the grievant, was a privilege "not available *to all persons similarly supervised*."[31] As long as the hearing officer's findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Because the Inmate worked as the Lieutenant's administrative clerk, and in light of the deficient notice

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[25] Agency Ex. 1, at 1. *See Rules for Conducting Grievance Hearings* § VI(B) ("[A] hearing officer's review is limited to the conduct charged in the Written Notice and attachments.").
[26] Agency Ex. 1, at 1.
[27] Reconsideration Decision at 5.
[28] Hearing Recording at 1:31:40-1:34:40; Agency Ex. 8.
[29] *See* Hearing Recording at 1:38:00-1:39:55.
[30] Request for Administrative Review at 3-4.
[31] *Id.* at 3 (citing OP 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*) (emphasis added).

discussed above, EDR finds no basis to disturb the reconsideration decision as to the conduct charged under OP 135.2.

Mitigation

As also directed by EDR's prior ruling,[32] the reconsideration decision assessed whether to consider inadequate notice of the agency's policies as a circumstance warranting mitigation of the agency's discipline.[33] The hearing officer concluded that deficient notice, in light of all the facts and circumstances, called for the agency's disciplinary action to be reversed:

> First, the context of this case is important. Grievant knew that inmates should not have access to the Internet. He acted to remind the Lieutenant that the Inmate should not have access to the Internet. In other words, Grievant's behavior was intended to reduce the likelihood of any harm to the Agency. Grievant did not have any reason to believe or suspect that the Inmate was accessing the Internet. Second, Grievant's work performance was otherwise satisfactory to the Agency. Grievant received an overall rating of Exceeds Contributor on his 2018 annual performance evaluation. Grievant had no prior active disciplinary action. Grievant showed he was capable of performing his duties going forward. The Hearing Officer has no reason to believe Grievant will permit an inmate to have access to the Internet in the future. Grievant does not need an alternate sanction to deter similar future violations because Grievant is a motivated professional dedicated to performing his job duties who "has shown tremendous growth as a Unit Manager."[34]

In disciplinary grievances, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (2) the behavior constituted misconduct, and (3) the agency's discipline was consistent with law and policy, then the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[35] Where the hearing officer does not sustain all of the agency's charges and finds that mitigation is warranted, he or she "may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process . . . that it desires a lesser penalty [to] be imposed on fewer charges."[36] EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion[37] and will reverse the determination only for clear error.

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[32] *See* EDR Ruling No. 2020-4966, at 9-10.
[33] In the original Hearing Decision, the hearing officer concluded that "Grievant knew that the Inmate was using the Lieutenant's computer and that the Lieutenant's computer had access to the Internet." Hearing Decision at 4. Thus, the hearing decision concluded that the agency "presented sufficient evidence to support the issuance of a Group III Written Notice" after the grievant "observed the Inmate using a computer with internet access . . . ." *Id.* at 5.
[34] Reconsideration Decision at 4 (footnotes omitted).
[35] *Rules for Conducting Grievance Hearings* § VI(B).
[36] *Id.* § VI(B)(1).
[37] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly

In this case, the hearing officer did not abuse his discretion in concluding that, in light of all the facts and circumstances, the agency's Written Notice exceeded the bounds of reasonableness. Each time the grievant saw the Inmate using the Lieutenant's computer (as reflected in the hearing record), he took action to confirm that there was no unauthorized use, as he understood it. The grievant lacked adequate notice that the agency's standards required further action on his part. The grievant had a positive performance history and no disciplinary record, suggesting that he was unlikely to repeat this or any similar offense going forward.[38] Because deficient notice in particular was "a material and mitigating circumstance" in this case,[39] EDR cannot say that a Written Notice issued at the level of a Group I or Group II would have been more reasonable than a Group III for the grievant's unwitting misconduct. Accordingly, the hearing officer did not err in reversing the agency's disciplinary action.

The agency disagrees, arguing that the hearing officer failed to consider aggravating circumstances, especially the actual extent of the Inmate's computer access and use. However, EDR has repeatedly held that a hearing officer's mere silence as to particular facts or evidence does not necessarily constitute a basis for remand;[40] in this case, both of the hearing officer's decisions acknowledged the extent of the Inmate's computer use.[41] In light of the limited record evidence of computer access the grievant actually observed, EDR has no basis to find that the hearing officer abused his discretion to assign appropriate weight to the evidence presented.

Finally, EDR notes that, contrary to the agency's argument,[42] the reconsideration decision did not change any of the agency's policies by reversing the Group III Written Notice issued to the grievant in this case. While the hearing officer concluded that the agency's written information security policies were contradictory and confusing, he also considered more generally whether the grievant should have known the standards cited in the Written Notice by other means – *e.g.* on-the-job training.[43] Nothing in either decision by the hearing officer, or indeed in either ruling upon administrative review, should be interpreted to usurp the agency's judgment as to the proper information security policies for its operations or as to its public safety mission more broadly. Instead, the reconsideration decision determined merely that the agency had not put the grievant on adequate notice of its standards, and that this and other circumstances merited mitigation of the discipline issued in this case. This determination is supported by the evidence in the record.

<u>CONCLUSION AND APPEAL RIGHTS</u>

For the reasons set forth above, EDR declines to disturb the hearing officer's reconsideration decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a

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erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*

[38] Reconsideration Decision at 4.

[39] *Id.*

[40] *See, e.g.*, EDR Ruling No. 2020-4982; EDR Ruling No. 2019-4786.

[41] *See* Hearing Decision at 3, 4-5; Reconsideration Decision at 2, 5.

[42] *See* Request for Administrative Review at 5.

[43] Reconsideration Deecision at 3-4.

hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.[44] 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.[45] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[46]

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