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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5220
March 18, 2021

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 11612. For the reasons set forth below, EDR must remand the decision for reconsideration and clarification.

FACTS

The relevant facts in Case Number 11612, as found by the hearing officer, are as follows:¹

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had prior active disciplinary action.

On August 8, 2020 at approximately 1:30 a.m. or 2 a.m., Grievant was working as the Control Booth Officer in the Building. He was responsible for opening doors to allow people to enter the Building. The Building had a large exterior window and the Control Booth had a large window. Someone standing outside of the Building could look through both windows and see an employee working in the Control Booth. An employee working in the Control Booth would be able to see people seeking entry into the Building. The distance between Grievant and the Building exterior window was approximately 15 to 20 feet.

An employee sitting in the Control Booth also could see through interior windows into the A side and B side of the Building. The Control Booth had an opening called a slot that allowed the Control Booth Officer to pass items to or speak with a Floor Officer working in side A or side B.

Grievant could hear radio calls while working in the Control Booth. The Control Booth had a telephone accessible to the Control Booth Officer.

¹ Decision of Hearing Officer, Case No. 11612 (“Hearing Decision”), February 9, 2021, at 2-3.

At 3:45 a.m. on August 8, 2020, the Lieutenant sent an email containing his statement of his interaction with Grievant a few hours earlier. No other witnesses drafted statements about the incident.

On September 17, 2020, the agency issued to the grievant a Group III Written Notice with removal for sleeping during work hours.² The Written Notice specified that the grievant was

observed sitting in a chair slightly tilted to the right with [his] hands over [his] head asleep in Housing Unit 3 by [the Lieutenant] and [Sergeant 1]. [The Lieutenant] knocked on the front door several times along with pulling on the door. The Lt. and Sgt. both shined their flash lights inside the control room and still no movement. [The Lieutenant] called via radio to Housing Unit 3 control and [the grievant was] witnessed jumping out of the chair to open the door.³

The grievant timely grieved the Written Notice, and a hearing was held on February 8, 2021.⁴ In a decision dated February 9, 2021, the hearing officer determined that the disciplinary action issued to the grievant “must be reversed” because “disparities in the evidence were so great that no level of disciplinary action can be upheld.”⁵

The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that the hearing officer failed to comply with the grievance procedure by not making findings on the material facts, despite uncontradicted evidence on those facts. Specifically, the agency contends that the evidence was undisputed as to whether the grievant was “asleep during his shift in the security booth,” and that the discrepancies cited in the hearing decision were “minor when compared to the fact that [witnesses] testified similarly and without contradiction that it took several minutes to gain

² Agency Ex. 1; *see* Hearing Decision at 1.

³ Agency Ex. 1.

⁴ *See* Hearing Decision at 1.

⁵ *Id.* at 3, 4.

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

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

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

Grievant's attention as he failed to acknowledge any attempts . . . to gain entry into the building."⁹ The agency also argues that the extent of the discrepancies cited by the hearing officer is not supported by the record.¹⁰

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹¹ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹² 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.¹³ 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.¹⁴ 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 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.

In this case, while the hearing officer concluded that the grievant was working as the control booth officer on August 8, 2020 in the 1:00 a.m. hour, he declined to credit any testimony from the agency's two witnesses – Sergeant 1 and the Lieutenant – as to whether they interacted with the grievant during his shift and observed him asleep at his post. He found their testimony not credible for the following reasons:

- 1) The Lieutenant's statement of his interaction with the grievant said the Lieutenant was making rounds with Sergeant 1 and another employee, Sergeant 2. The statement further recounted that Sergeant 2 knocked on the front door of the control room. Yet neither the Lieutenant nor Sergeant 1 mentioned Sergeant 2 in their testimony.¹⁵
- 2) The Lieutenant and Sergeant 1 gave differing testimony about what part of the grievant's head or face they could see while trying to get his attention.¹⁶
- 3) The Lieutenant and Sergeant 1 gave differing testimony about whether a floor officer was present during the interaction.¹⁷
- 4) The Lieutenant and Sergeant 1 gave differing testimony about how the grievant woke from sleep. Sergeant 1 testified that grievant awoke when the phone rang. The Lieutenant

⁹ Agency Request for Review at 3.

¹⁰ *Id.* at 3-4.

¹¹ Va. Code § 2.2-3005.1(C).

¹² *Grievance Procedure Manual* § 5.9.

¹³ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁴ *Grievance Procedure Manual* § 5.8.

¹⁵ Hearing Decision at 3. At the hearing officer's request, the agency provided the Lieutenant's contemporaneous statement following the hearing. *See* Hearing Recording at 1:33:44-1:35:00; Agency Supp. Ex. It appears that no evidence other than this statement referenced Sergeant 2, and the presence or absence of a third employee was not the subject of witness questioning at the hearing.

¹⁶ Hearing Decision at 3.

¹⁷ *Id.*

testified that the floor officer woke him up; his written statement from the same night said that he woke the grievant up via radio.¹⁸

Based on these inconsistencies, the hearing officer reasoned that:

[i]t is unusual for two witnesses to have significantly different accounts of events and for one of those witnesses to have contemporaneously drafted a statement that materially contradicts his own testimony. Although both Sergeant 1 and the Lieutenant were testifying truthfully, their recollections were materially flawed to the point it is unclear whether they were both talking about the same employee (Grievant) and what behavior they observed.¹⁹

Further, the hearing officer found that, even if he disregarded the Lieutenant's testimony in favor of his contemporaneous statement, the evidence would still be inconsistent as to whether the grievant was awakened by a radio call or a telephone call.²⁰ Accordingly, the hearing officer concluded, the "disparities in the evidence were so great that no level of disciplinary action can be upheld."²¹

Upon a thorough review of the record, and acknowledging hearing officers' broad discretion to consider and weigh the evidence, EDR nevertheless cannot find that the hearing decision contains sufficient findings as to the material fact of whether the grievant was asleep during work hours on August 8, 2020, as the Written Notice alleged. In consideration of the evidence, the hearing officer evaluated three accounts of the same event: the Lieutenant's contemporaneous written statement, Sergeant 1's hearing testimony, and the Lieutenant's hearing testimony. In all three versions, the declarant approached the Building in the early morning hours of August 8 and was initially unable to enter.²² Also in all three versions, the declarant claimed to be able to identify the grievant stationed in the control booth and appearing to be asleep.²³ Moreover, in all three versions, the supervisors were unable to attract the grievant's attention via knocking or shining a flashlight into the room.²⁴ Finally, in all three versions, the grievant opened the door to let the supervisors in after he appeared to be startled awake.²⁵ No record evidence put these details into dispute; yet it appears that the hearing officer declined to make findings on these points because he did not deem any of the evidence credible as to the events at issue.²⁶

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.*

²² Hearing Recording at 10:15-14:25 (Sergeant 1's testimony); *id.* at 26:20-27:13 (Lieutenant's testimony); Agency Supp. Ex.

²³ Hearing Recording at 10:15-11:17, 13:22-14:06 (Sergeant 1's testimony); *id.* at 27:25-30:49 (Lieutenant's testimony); Agency Supp. Ex.

²⁴ *Id.*

²⁵ Hearing Recording at 14:35-14:46 (Sergeant 1's testimony); *id.* at 31:15-32:30, 33:30-34:15 (Lieutenant's testimony); Agency Supp. Ex.

²⁶ As a result, the hearing officer's only findings as to what occurred on August 8 were that the grievant was working in the control booth during the 1:00 a.m. hour and that the Lieutenant drafted a statement in the 3:00 a.m. hour claiming to have interacted with the grievant a few hours earlier.

Nothing in this ruling limits the discretion of the hearing officer with respect to weighing the credibility and reliability of the evidence; nor do we discount the significance of material inconsistencies in evidence presented by a party who bears the burden of proof. However, in the rare situation when a hearing officer deems it appropriate to reject otherwise undisputed material evidence such that no factual findings can be made as to the primary claims in the case, the hearing decision should include specific findings as to why the undisputed evidence was nevertheless not credible. While the hearing decision in this case detailed inconsistencies in the evidence, EDR is nevertheless unable to discern why all three accounts before the hearing officer were considered wholly and equally unreliable as to the issue of whether the grievant committed the charged misconduct.

In considering conflicting accounts of the same event, a hearing officer may assess the reliability of a source either generally or with respect to specific facts. Here, the hearing officer's analysis suggests that he found the Lieutenant's statement, Sergeant 1's testimony, and the Lieutenant's testimony each to be *generally* unreliable as to what occurred at the grievant's control booth on August 8, 2020. However, assuming that the record supports the inconsistencies cited by the hearing officer, these inconsistencies alone do not appear to render all three accounts wholly untrustworthy. For example, as to the presence of Sergeant 2, the hearing officer found it "most likely that three employees [the Lieutenant and the two sergeants] approached the Building on August 8, 2020," as the Lieutenant's contemporaneous statement said.²⁷ By this sound reasoning, it is unclear why the hearing officer nevertheless declined to credit any of the three accounts – including the Lieutenant's contemporaneous statement – as to any details of the alleged interaction with the grievant, including those details that were consistent and undisputed between the accounts.

The hearing officer did find that the Lieutenant and Sergeant testified truthfully but that their recollections were materially flawed.²⁸ In citing numerous discrepancies between the Lieutenant's recollections and his written statement of August 8, the hearing decision articulates findings that could reasonably support discounting the Lieutenant's testimony in general, in the hearing officer's discretion. But the hearing decision does not provide a basis to extend the same reasoning to find that both the written statement and Sergeant 1's testimony were likewise so substantially flawed as to discredit their entire accounts as well – especially to the extent that those flaws are based on inconsistency with the Lieutenant's testimony.

The hearing decision notes that the Lieutenant's written statement and Sergeant 1's testimony differed in two respects: (1) the statement referenced a third supervisor while Sergeant 1 spoke only of himself and the Lieutenant, and (2) the statement had the grievant awakened by radio while Sergeant 1 said it was a phone call.²⁹ Although these discrepancies are not trivial, it is not clear how they would create rational grounds in and of themselves to discredit undisputed evidence that both declarants saw the grievant apparently asleep on the job on August 8, as charged.

²⁷ Hearing Decision at 3.

²⁸ *Id.* at 4.

²⁹ *Id.* at 3-4.

In sum, hearing officers must make findings of fact as to the material issues in the case based on their consideration of the evidence presented.³⁰ While they have sole discretion to weigh conflicting evidence and assess credibility, here the evidence did not conflict as to whether the grievant appeared to be asleep when other employees approached the control booth where he was on duty, and the hearing officer's credibility analysis does not articulate a rationale for rejecting *all* of the undisputed evidence on that material issue. Accordingly, EDR must remand the decision for additional findings and clarification as to the significance and reliability of the evidence as to whether the grievant was asleep during work hours. If the hearing officer deems all of the undisputed evidence unreliable as to the charged misconduct, such that no findings of fact are possible on that issue, the hearing decision should clearly identify the grounds for rejecting the evidence. To the extent the hearing officer's reconsideration hinges on evidence contained in the Lieutenant's written statement – which was produced only after the hearing proceedings and was thus not explored in testimony – the hearing officer may, in his discretion, reopen the record to pose questions and/or take additional evidence in connection with the Lieutenant's contemporaneous statement and/or related matters as determined appropriate.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a reconsideration decision containing findings as to the material issue of whether the grievant engaged in the conduct charged in the Written Notice: sleeping during work hours. If the hearing officer concludes that no such findings can be drawn from probative evidence that is not in conflict or dispute, the reconsideration decision must clearly articulate why such undisputed relevant evidence is ultimately insufficient to carry the agency's burden to prove that the discipline it imposed was warranted and appropriate under the circumstances.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.³¹ 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.³² 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.³³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁴

³⁰ *Rules for Conducting Grievance Hearings* § V(C).

³¹ *See Grievance Procedure Manual* § 7.2.

³² *Id.* § 7.2(d).

³³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁴ *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).

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