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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5223
March 31, 2021

The grievant 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 decision in Case Number 11604. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11604, as found by the hearing officer, are as follows:¹

The Department of Corrections employs Grievant as a Lieutenant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On March 23, 2020, Grievant was working as the Shift Commander at the Facility. Her shift began at 5:45 p.m. and ended at 6:15 a.m. the following day. Grievant was in charge of the Facility during her shift. Six officers typically work on the shift but there were only five working on March 23, 2020.

On March 23, 2020, the Inmate attempted suicide and needed to be taken to the Hospital to stay overnight. The Inmate was a Level 1 or Level 2 security inmate. She was placed in “general population” at the time.

Anyone wishing to enter the Facility had to be searched for contraband prior to entering. No one worked at the entry during the night shift. The Facility’s practice was that an employee would be called from another post to go to the entry post to conduct the search. On March 23, 2020, Grievant and Officer F entered the Facility without being searched.

¹ Decision of Hearing Officer, Case No. 11604 (“Hearing Decision”), February 18, 2021, at 2-3.

The Inmate was placed in restraints. Grievant escorted the Inmate to the Transportation Vehicle by herself. The Inmate was transported to the Hospital by corrections officers.

When the Inmate returned to the Facility, the Inmate was put in a “strip cell” on constant watch. The Inmate was supposed to be placed in a safety smock made of material that the Inmate could not use to harm herself. Constant watch required a Corrections Officer to be close to the Inmate to constantly watch the Inmate and be ready to respond in the event the Inmate attempted to harm herself.

Grievant attempted to locate the smock, but could not find it. The Inmate was given a night gown to wear instead of the smock. When a Corrections Officer was on break, Grievant watched the Inmate on a video monitor in Master Control as she performed her other duties. When the next shift began, another employee quickly found the safety smock in the storage area where Grievant looked but could not find the smock.

On July 28, 2020, the agency issued to the grievant a Group II Written Notice for failure to follow policy.² The grievant timely grieved the disciplinary action and a hearing was held on January 29, 2021.³ In a decision dated February 18, 2021, the hearing officer found that several of the charges on the Written Notice did not support discipline at the level of a Group II offense.⁴ Nonetheless, the hearing officer concluded that the agency had “presented sufficient evidence to support the issuance of a Group II Written Notice” because the grievant “failed to have an employee in front of the Inmate watching the Inmate who was on Constant Watch,” which was a violation of agency policy.⁵ The hearing officer further determined that there were no circumstances warranting mitigation of the disciplinary action.⁶

The grievant now appeals the 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”⁷ 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.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing

² Hearing Decision at 1; Agency Ex. 1.

³ See Hearing Decision at 1.

⁴ These included allegations that the “Grievant allowed Officer F to ‘set up weapons and ammunition for herself,’” that the grievant and Officer F “entered the facility without being searched,” and that the “Grievant escorted the Inmate to the Transportation Vehicle by herself even though policy required two officers to escort the Inmate.” Hearing Decision at 3-4; see Agency Ex. 1.

⁵ Hearing Decision at 4.

⁶ *Id.* at 5.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant generally disputes the hearing officer's assessment of the evidence and conclusion that she engaged in misconduct warranting a Group II Written Notice. More specifically, she argues that her arrangement for monitoring the inmate on camera was the only option that allowed other officers to take necessary breaks and that she had no choice except to deviate from policy under the circumstances. The grievant also appears to contend that the hearing officer should have mitigated the discipline because the institution was understaffed, which made monitoring the inmate more difficult.

Hearing Officer's Consideration of Evidence

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹⁰ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹¹ 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.¹² 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.¹³ 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.

The grievant claims that the hearing officer erred in upholding the Written Notice and disagrees with the hearing officer's conclusion that she engaged in misconduct. In support of her position, the grievant argues that several officers needed to take breaks while the Inmate was on constant watch and she was therefore unable to assign an officer outside the Inmate's cell. As a result, the grievant asserts that monitoring the Inmate by camera, with another officer stationed nearby to intervene if needed, was her only option. The grievant further notes that she, as a supervisor, was responsible for a number of other tasks during her shift in addition to monitoring the Inmate.

In the hearing decision, the hearing officer assessed the evidence regarding the grievant's monitoring of the inmate:

On October 21, 2019, Grievant attended a Call to Order with several other employees. During the meeting, Grievant was instructed that:

⁹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ Va. Code § 2.2-3005.1(C).

¹¹ *Grievance Procedure Manual* § 5.9.

¹² *Rules for Conducting Grievance Hearings* § VI(B).

¹³ *Grievance Procedure Manual* § 5.8.

Constant watch requires a person to sit in front of the cell and constantly watch the offender while making documentation every 15 minutes.

In addition, Operating Procedure 730.5 governs MHS Behavioral Management and requires a, “Corrections Officer will physically observe the offender on a continuous and uninterrupted basis and will maintain a clear and unobstructed view of the offender at all times.”

Grievant allowed a Corrections Officer watching the Inmate to go on break without being relieved by another officer. In the event the Inmate attempted to injure herself, no one would have been within a close distance to stop the Inmate. Grievant was watching the Inmate by video camera, but was performing other duties. She was not constantly watching the Inmate and she was not in a position to prevent the Inmate from harming herself. Grievant’s actions were contrary to the Agency’s policy and instruction she received.

Grievant argued that policy did not require an employee to be in front of the Inmate monitoring the Inmate. Grievant argued she only watched the Inmate on the video monitor because she had to let a correction officer take a break. The evidence showed that the Agency’s policy and instruction required a corrections officer to be close to the Inmate at all times. Grievant should have had a second officer take over observation duties for the officer going on break.¹⁴

EDR has thoroughly reviewed the hearing record and finds there is evidence to support the hearing officer’s determination that the grievant engaged in the behavior charged on the Written Notice, that her behavior constituted misconduct, and that the discipline was consistent with law and policy. As the hearing officer noted, the relevant agency policy states that constant watch requires a corrections officer to “physically observe the offender on a continuous and uninterrupted basis.”¹⁵ Moreover, the agency offered evidence that the grievant attended a meeting in October 2019 where attendees were notified that “[c]onstant watch requires a person to sit in front of the cell and constantly watch the offender while making documentation every 15 minutes.”¹⁶ At the hearing, the superintendent at the institution testified that the on-site medical authority ordered the inmate on constant watch, which meant that someone must physically observe the inmate and document their activity at 15-minute intervals.¹⁷ The superintendent explained that monitoring an inmate on constant watch by camera is not permitted.¹⁸

In her testimony, the grievant alleged that monitoring an inmate by camera was permitted.¹⁹ She further explained that she had to give several corrections officers mandatory breaks while the inmate was on constant watch, which left her no option but to monitor the inmate by camera until

¹⁴ Hearing Decision at 4 (citations omitted).

¹⁵ Agency Ex. 6 (p. 72 of Agency Exhibits).

¹⁶ Agency Ex. 8 (p. 94 of Agency Exhibits).

¹⁷ Hearing recording at 21:13-24:41 (superintendent’s testimony); *see* Agency Ex. 7 (p. 91 of Agency Exhibits) (stating that the medical authority had placed the inmate on constant watch).

¹⁸ Hearing recording at 38:15-38:39, 52:08-52:15 (superintendent’s testimony).

¹⁹ *Id.* at 1:27:41-1:27:51, 1:36:47-1:37:20 (grievant’s testimony).

the officers returned from their breaks.²⁰ Conclusions as to the credibility of witnesses are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.²¹

Although the grievant may disagree with the decision, there is nothing to indicate that the hearing officer's consideration of the evidence regarding the grievant's misconduct was in any way unreasonable or not based on the actual evidence in the record. 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. Because the hearing officer's findings in this case 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 hearing decision on this basis.

Mitigation

By statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR].”²² The *Rules for Conducting Grievance Hearings* (“*Rules*”) provide that “a hearing officer is not a ‘super-personnel officer’”; therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”²³ More specifically, 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.²⁴

Because reasonable persons may disagree over whether and to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is

²⁰ *Id.* at 1:27:51-1:28:25, 1:37:21-1:38:18 (grievant's testimony).

²¹ *See, e.g.*, EDR Ruling No. 2014-3884.

²² Va. Code § 2.2-3005(C)(6).

²³ *Rules for Conducting Grievance Hearings* § VI(A).

²⁴ *Id.* § VI(B).

high.²⁵ EDR, in turn, will review a hearing officer's mitigation determination for abuse of discretion²⁶ and will reverse the determination only for clear error.

In her request for administrative review, the grievant disputes the hearing officer's decision not to mitigate the disciplinary action. In particular, the grievant claims that she was unable to manage staffing properly because several employees called out on the evening the incident occurred, which left her unable to assign a corrections officer outside the inmate's cell. She further argues that the institution was experiencing understaffing issues at that time, particularly a shortage of female officers. The hearing officer addressed this issue in the decision as part of his mitigation analysis, noting that the "Grievant claimed her actions were affected by the Facility's limited staffing."²⁷ However, the hearing officer concluded that the "Grievant was responsible for ensuring proper staffing" as a supervisor and, thus, "[t]o the extent inadequate staffing was a mitigating circumstance, Grievant's failure to ensure full staffing was an off-setting aggravating circumstance."²⁸ Accordingly, the hearing officer found no basis to mitigate the Group II Written Notice.²⁹

Here, the mitigating factors cited by the grievant on administrative review are not so extraordinary that they would clearly justify mitigation of the agency's decision to issue a Group II Written Notice. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"³⁰ EDR has found no specific evidence of mitigating factors presented in the record that were not addressed in the decision, nor has the grievant identified any on administrative review. Although the grievant disagrees with the hearing officer's analysis of mitigating factors, EDR has no basis to conclude that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. Accordingly, we decline to disturb the decision on these grounds.

²⁵ The federal Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can serve as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein). The Board's similar standard prohibits interference with management's judgment unless, under the particular facts, the discipline imposed is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) (citations and internal quotation marks omitted). On the other hand, the Board may mitigate discipline where "the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness." *Batten v. U.S. Postal Serv.*, 101 M.S.P.R. 222, 227 (M.S.P.B. 2006), *aff'd*, 208 Fed. App'x 868 (Fed. Cir. 2006).

²⁶ "'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 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.*

²⁷ Hearing Decision at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.21).

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's 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

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³¹ To the extent this ruling does not address any specific issue raised in the grievant's appeal, EDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure such that remand is warranted in this case.

³² *Grievance Procedure Manual* § 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).