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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2021-5277
August 3, 2021

The Department of Corrections ("the agency") 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 11653. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11653, as found by the hearing officer, are as follows:

> Grievant is a Correctional Officer with 9 years of service with the [agency]. He has received several Extraordinary Contributor evaluations.
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> On October 11, 2020, a female correctional officer stopped at the cell door . . . . The correctional officer preceded to engage in a personal conversation about her family and so forth with the inmates in [the cell]. The conversation was recorded by the Command Officer from the command room. The conversation was estimated to be between 7 and 20 minutes. Later in the day, Grievant, also a correctional officer, did rounds past [the cell]. At that time an inmate called out to him and Grievant had a less than one minute conversation. During the conversation, the inmates reported one of them made an up and down movement with his hand near his groin area. It was not established that, if this motion had occurred, that Grievant saw it. The command officer recorded this as the following conversation:
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> Inmate [1]: What's up man?
> Inmate [1]: What you know bro?
> Inmate [2]: Where that bitch at?
> [Grievant]: What?
> Inmate [2]: Where that girl at?
> Laughing
> [Grievant]: I don't know
> [Grievant]: You looking for her?

Inmate [2]: Yeah I'm looking for her, I'm looking for her
[Grievant]: Y'all being nasty
Laughing
Inmate [1]: Hell man, you alright dog?
[Grievant]: Yeah
Inmate [1]: Take it easy Brother
Inmate [1]: We got a double visit
Inmate [2]: Ain't nobody gonna be in this jank right here.
Inmate [1]: Hell yeah
[Grievant]: Alright
Inmate [1]: Alright Bro

> Both the female correctional officer and Grievant's conversations were reported. The female correctional officer received a needs improvement substandard discipline which was not a Written Notice as discipline for her behavior. . . . The Agency alleged Grievant violated several protocols by not reporting what Agency identified as a sexually threatening conversation and further by Grievant permitting inmates to call Grievant "bro" and "dawg".[1]

On December 3, 2020, the agency issued to the grievant a Group II Written Notice with a ten-workday suspension for unsatisfactory work performance and failure to follow agency policies related to professional conduct, ethics, and reporting of serious or unusual incidents.[2] The grievant timely grieved the discipline and a hearing was held on May 10, 2021.[3] In a decision dated June 8, 2021, the hearing officer concluded that the agency had not presented sufficient evidence to prove that the conversation between the grievant and the inmates presented a dangerous, sexual threat or that the grievant had an especially friendly relationship with inmates such that disciplinary action was warranted.[4] Accordingly, she rescinded the Group II Written Notice and the grievant's suspension.[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

[1] Decision of Hearing Officer, Case No. 11653 ("Hearing Decision"), June 8, 2021, at 3-4 (citations omitted).
[2] Although the Written Notice makes reference to policies prohibiting fraternization with offenders, the agency's advocate clarified at the hearing that the grievant was not charged with fraternization. Hearing Recording at Track 1, 52:54-54:59.
[3] Hearing Decision at 1.
[4] *Id.* at 5.
[5] *Id.* at 6.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

decision comports with policy.[8] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[9] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[10] 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.[11] 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.[12] 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 its request for administrative review, the agency objects to the hearing officer's determination that the grievant did not engage in misconduct under agency policies. The agency maintains that, contrary to the hearing officer's findings, the grievant knew or should have known that the inmates' comments were threatening, and thus he was required to report the conversation.[13] The agency also argues that the grievant's "laughing at the [inmates'] comments," his "joking with the inmates," and his allowing the inmates to address him as "bro" and "dawg" were unprofessional and unethical.[14] In addition, the agency contends that the hearing officer erred in determining that the grievant was similarly situated to another correctional officer who had an inappropriate conversation with the inmates on the same day, but who was disciplined less harshly than the grievant.[15]

Misconduct Under Agency Policy

In this case, the Written Notice charged the grievant with failure to follow policy and unsatisfactory performance, describing the offense as follows:

> On October 11, 2020 [the grievant] was recorded talking to two inmates. The recorded conversation has one of the inmates asking [the grievant], "Where that bitch at?" "Where that girl at?" [The grievant] is hearing asking the inmate, "You

[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Va. Code § 2.2-3005.1(C).
[10] *Grievance Procedure Manual* § 5.9.
[11] *Rules for Conducting Grievance Hearings* § VI(B).
[12] *Grievance Procedure Manual* § 5.8.
[13] Request for Administrative Review at 1-2.
[14] *Id.* at 2, 4.
[15] *Id.* at 2-3.

> looking for her?" The inmate says "Yeah I'm looking for her, I'm looking for her[.]"
>
> An internal investigation revaled that both offenders and a staff member stated the comment was meant as a sexual reference.
>
> . . . .
>
> Failure to report the incident jeopardized the safety of staff and/or inmate[s].[16]

The Written Notice described the grievant's behavior as (1) violation of OP 135.1, *Standards of Conduct*; (2) violation of OP 135.2, *Rules of Conduct Governing Employee Relationships with Offenders*; (3) violation of OP 135.3, *Standards of Ethics and Conflict of Interest*; (4) violation of OP 038.1, *Reporting Serious or Unusual Incidents*, and (5) violation of security post orders.

Evidence Regarding Grievant's Conversation with the Offenders

The hearing officer determined that the grievant's conduct did not amount a failure to follow any of the above policies:

> The Agency alleged the conversation between Grievant and Inmates relayed intention to do harm to the female commanding officer. In a prison facility one would expect sequestered males to take advantage of any opportunity with a female. Therefore, attention should already have been given to protect all women present in the facility be they correction officers, counselors, nurses, visitors, or others. In other words, even if Grievant's conversation rose to the level of threat to do harm, heightened security should already have been in place for females.
>
> The inmates … gave conflicting evidence each time they were interviewed. Even if one of the inmates had made a sexual gesture there is no direct evidence that Grievant saw it. There is no evidence that Grievant was aware the female correction officer on duty had given the inmates extra attention and therefore no reason to believe he connected the inmates' comments with her. Grievant's conversation with the inmates was jovial, laughing was heard. There is no preponderance of evidence that, reportable threatening or dangerous remarks were made.[17]

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[16] Neither party offered a copy of the Written Notice as part of their exhibits, and thus the Written Notice is not a part of the hearing record. In some cases, an agency's failure to introduce the Written Notice at the hearing could result in rescission of the discipline. However, the grievant has not objected to this issue or raised it in an appeal to EDR. The hearing officer appears to have reviewed and relied upon the copy of the Written Notice that EDR included with the appointment packet assigning the case to her. As a result, we will do the same for purposes of this ruling. EDR's action in doing so is not meant to accept a document into evidence that was not presented at hearing or ruled upon by the hearing officer. While the case will not be remanded to the hearing officer for the reasons described in this ruling, if it were to be remanded, the hearing officer would have to address this lack of material evidence and determine whether there is any basis to admit the Written Notice into the record at that time.

[17] Hearing Decision at 5.

The agency maintains that the grievant's conduct did in fact violate the policies cited on the Written Notice. In its request for administrative review, the agency points out that the grievant's response of "Y'all being nasty" to the inmates indicated that he understood the comments "to be nefarious and sexually related."[18] The agency further notes that, despite any inconsistency in the inmates' accounts of their roles in the conversation, it was clear that "the words were sexual in nature," as shown by one inmate's making "the motion of pumping his arms towards his groin."[19] The agency alleges that the hearing officer apparently "brush[ed] off the comments as seemingly innocuous and expected in the prison setting," despite the agency's policy requiring the timely reporting of threatening behavior, whether such behavior is directed at employees or other inmates.[20] Finally, the agency argues that the grievant's "laughing" and "joking" with the inmates during the conversation was unethical and conduct unbecoming an agency employee.[21]

The primary charge against the grievant in this case is that he engaged in an unprofessional conversation with two inmates, during which the inmates made sexually threatening comments about another employee at the institution. The agency alleges that the grievant knew or should have known that the conversation was sexually threatening, and thus his failure to report the conversation violated agency policy requiring the report of such incidents. The context and content of the conversation, including what the grievant knew or should have known about the nature of the inmates' comments, was a factual determination within the hearing officer's authority to assess. Having thoroughly reviewed the hearing record, EDR finds no basis to conclude that the hearing officer abused her discretion in determining that the preponderance of the evidence did not support a conclusion that "reportable threatening or dangerous remarks were made" by the inmates.[22]

At the hearing, the parties stipulated to a written account of the conversation that is recited in full above.[23] The agency suggests that the evidence is clear that the inmates intended their comments to the grievant as sexual.[24] However, the agency had the burden to prove not only that the grievant engaged in the behavior described on the Written Notice, but also that his behavior constituted misconduct under agency policy.[25] The central question is, therefore, whether the grievant knew or should have known at the time that the inmates' comments were sexually threatening, which would have triggered an obligation to report the conversation under agency policy.

Considered as a whole, the agency's evidence that the grievant knew or should have known that the inmates' comments were sexually threatening is circumstantial. Indeed, as the hearing officer correctly noted, there is no direct evidence that the grievant saw the inmate's sexual gesture

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[18] Request for Administrative Review at 1.
[19] *Id.*
[20] *Id.* at 2.
[21] *Id.*
[22] *See* Hearing Decision at 5.
[23] Hearing Recording at Track 1, 29:09-37:18; Grievant's Ex. 9; *see* Hearing Decision at 3 n.9 (noting that the parties agreed to the account of the conversation as described in the decision).
[24] *See*, *e.g.*, Agency Exs. 4, 7, 9.
[25] *Rules for Conducting Grievance Hearings* § VI(B)(1) (describing the framework under the grievance procedure for hearing officers to determine whether discipline was warranted and appropriate).

toward his groin.[26] Additionally, the hearing officer found there was no evidence presented to demonstrate that the grievant had any reason to connect the inmates' comments with the female correctional officer.[27] For example, the inmates did not refer directly to the female officer or any specific individual during the conversation; the grievant, meanwhile, testified that he did not know who the inmates were talking about, but assumed they were referring to another inmate.[28] Most significantly, nothing in the content of the conversation itself was explicitly sexually threatening, as the hearing officer appears to have determined.[29]

We do not disagree with the agency's contention that sexually threatening comments of any kind in its work environment should not be considered "innocuous or expected,"[30] though the hearing officer does not appear to have condoned such conduct as the agency alleges. The hearing officer appears instead to have been observing that agencies should adopt safety measures as needed to ensure the safety of employees, inmates, and other individuals. Although the agency disagrees with her assessment, the hearing officer was entitled to evaluate the testimony of the witnesses regarding the nature of the grievant's conversation with the inmates and to accept the grievant's account of these events as more persuasive.

In summary, the hearing officer clearly found that, based on the evidence in the record about the grievant's knowledge at the time of the incident, the agency had not proved that the grievant knew or should have known that he was required to report the inmates' comments as a matter of agency policy. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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 nothing in the record suggests that the hearing officer in this case abused her discretion in that regard. To the contrary, EDR has reviewed no record evidence disregarded by the hearing officer that demonstrates the grievant knew or should have known that the conversation was sexually threatening in nature such that his failure to report the conversation was a policy violation under the circumstances. Accordingly, EDR perceives no reversible error in the hearing officer's analysis of this issue.

Inmates' Use of "Bro" and "Dawg"

The agency further alleges that the hearing officer erred in not upholding the Written Notice on the grounds that the grievant's conversation with the inmates was unprofessional and unethical. In particular, the agency contends that the grievant's permitting the inmates to address him as

[26] Hearing Decision at 5.
[27] *Id.*
[28] Hearing Recording at Track 2, 1:17:47-1:17:54, 1:20:04-1:21:03 (grievant's testimony). There was some evidence to suggest that other inmates at the institution used female pronouns. *Id.* at Track 1, 57:58-59:28 (corrections officer's testimony).
[29] Hearing Decision at 5.
[30] Request for Administrative Review at 2.

"bro" and "dawg" was a violation of agency policy.[31] Acknowledging that "allowing use of those words was not the most egregious part of his offense," the agency nonetheless argues that the grievant's failure to "correct[] the inmates' behavior immediately" was unprofessional conduct that justified the issuance of a Group II Written Notice.[32]

The hearing officer considered the evidence on this issue as follows:

> The Warden stated in testimony that using the word "man", as in "Hey, man," was ok but "hey, bro" or "hey, dawg" showed familiarity. The actual difference is cultural dialect preference. Further, if correctional officers should be addressed as "Sir" or "Officer", then there should have been written policy advising inmates how to address prison officials. Correctional Officers should have a written policy they must correct inmates when using any form of "hey, you". No such policy was presented as evidence. The use of dialect slang shows no particular intimate relationship.[33]

As an initial matter, the Written Notice itself does not describe the inmates' use of "bro" and "dawg" or the grievant's alleged failure to correct this behavior as a basis for discipline. The Written Notice instead cites the grievant's failure to report the alleged sexually threatening nature of the inmates' comments as unsatisfactory performance and a failure to follow policy. Nonetheless, both parties presented argument and evidence at the hearing about this aspect of the conversation in relation to the Written Notice.

As the hearing officer noted, the warden testified about appropriate methods of address and explained that the grievant should have corrected the inmates when they referred to him using "bro" and "dawg."[34] The grievant, on the other hand, testified that he has heard inmates address employees as "bro" and dawg" throughout his career and was unaware of any employees who were disciplined for failing to correct inmates that did so.[35] Moreover, EDR has not identified any policy or other evidence in the record to indicate that the grievant knew or should have known at the time of the incident that he was expected to correct inmates if they referred to him as "bro" or "dawg." In the absence of evidence demonstrating that the grievant was aware of a particular policy or instruction regarding how he should have responded to inmates' use of "bro," "dawg," or any other inappropriate method of address, it would appear that this aspect of the grievant's conduct—the alleged failure to maintain an appropriate professional interaction with the inmates—would, at most, justify a Group I Written Notice for unsatisfactory performance.

Here, the hearing officer determined that the grievant's behavior in this respect was not a violation of agency policies about professional conduct, nor was it otherwise improper.[36] Upon a thorough review of the record, EDR cannot find that the hearing officer failed to consider the

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[31] Request for Administrative Review at 4.
[32] *Id.*
[33] Hearing Decision at 5.
[34] Hearing Recording at Track 1, 2:08:35-2:10:07 (warden's testimony).
[35] *Id.* at Track 2, 1:21:31-1:22:26 (grievant's testimony).
[36] Hearing Decision at 5.

evidence about this aspect of the conversation and the relevant policies as charged on the Written Notice in compliance with the requirements of the grievance procedure. As noted above, determinations of credibility as to disputed facts of this nature are precisely the sort of findings reserved solely to the hearing officer. Because the hearing officer's findings of facts with regard to this issue are based upon evidence in the record and address the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings. Accordingly, we decline to disturb the decision on these grounds.

Mitigation

Finally, the agency claims that the hearing officer erroneously determined that the grievant was disciplined more harshly than another similarly situated employee who also spoke with the inmates on the same day.[37]

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]."[38] 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."[39] 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.[40]

In the decision, the hearing officer discussed whether a comparator employee was similarly situated to the grievant, noting that "[t]he discipline given to Grievant, in light of the discipline given to another officer in a similar situation, was starkly different."[41] As discussed more fully above, however, the hearing officer found in this case that the evidence in the record was insufficient to support the issuance of disciplinary action for the charged misconduct. Although the hearing officer went on to consider mitigating factors, she found that the grievant's behavior did not constitute misconduct and we have found no error in that conclusion. Accordingly, any discussion of mitigating factors in the hearing decision has no bearing on the outcome of this case. We therefore decline to disturb the decision on these grounds.

CONCLUSION AND APPEAL RIGHTS

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

[37] *See* Request for Administrative Review at 2-3.
[38] Va. Code § 2.2-3005(C)(6).
[39] *Rules for Conducting Grievance Hearings* § VI(A).
[40] *Id.* § VI(B).
[41] Hearing Decision at 6.

hearing decision once all timely requests for administrative review have been decided.[42] 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.[43] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[44]

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