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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2022-5303  
September 21, 2021

The grievant 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 11678. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 11678, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Corrections [“the agency”] employed Grievant as a Sergeant at one of its facilities until she was demoted to Corrections Officer. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was promoted to Sergeant on August 10, 2020. The Agency was supposed to ensure that Grievant completed Basic Skills for New Supervisors by February 10, 2021. Until she completed the training, she was to be partnered with an experienced supervisor. Grievant was paired with the Lieutenant for on-the-job training. Basic Skills classroom Training was scheduled for December 7, 2020 but Grievant cancelled the training due to her inability to attend.

On November 23, 2020, the Lieutenant gave Grievant a Notice of Needs Improvement/Substandard Performance. Grievant did not agree with the corrective action.

On November 24, 2020, Grievant spoke with Officer P about the Notice of Needs Improvement/Substandard Performance she received. She asked Officer P how to grieve the counseling. Officer P discussed how he would respond based on his prior military experience.

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<sup>1</sup> Decision of Hearing Officer, Case No. 11678 (“Hearing Decision”), August 17, 2021, at 2-4 (footnotes omitted).

The Captain learned of the conversation and had the Lieutenant instruct Grievant report to her office.

The Captain met with Grievant to discuss Grievant speaking with Officer P. The Captain asked Grievant if Grievant and Officer P were discussing Grievant's corrective action from the Lieutenant. Grievant said they were discussing Grievant's corrective action. The Captain said that Officer P was talking about how he was giving Grievant advice based on when he was in the military and he was late leaving from work. The Captain advised her to "please not talk to other line staff about problems her and [the Lieutenant] were having. I instructed her that when a supervisor or any other staff are being talked to, it is to stay amongst themselves and we as supervisors do not discuss these types of issues with officers as it can create a divide with staff. I went on to elaborate that we are all to act professionally and not discuss issues like this and as a supervisor we vent up and not down and it was nobody else's concern with what goes on with any supervisor or other staff."

Several hours later on November 24, 2020, Grievant sent a text message to Sergeant D containing the corrective action she received from the Lieutenant along with a proposed letter of resignation. When the Captain learned of this, the Captain believed Grievant had violated her earlier instruction.

Grievant read and signed the Post Order for Shift Commander on October 20, 2020. She acknowledged that she had read, discussed the post with her supervisor, and understood the post.

The Front Entry post at the Facility was essential to the Facility's operations. The Front Entry post had a Post Order describing the duties of the post. The Facility provided employees approximately 64 hours of training before the employees were permitted to work the Front Entry post. The post had emergency procedures to follow.

On November 25, 2020, Grievant was working as Shift Commander at the Facility. She was responsible for supervising staff at the Facility. The Shift Commander Post Order required Grievant to:

The Shift Commander will read, sign, and adhere to Post Orders and ensure that all security staff assigned to the shift will do the same.

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All correctional staff are responsible for the following:

- a) Read the post order before assuming duties of that post. Once you have read and understood the post order, address any

questions/concerns with the immediate supervisor and have the post orders countersigned by the supervisor to verify that all issues have been addressed and resolved.

- b) Sign the Post Orders the first time each quarter you work any post.
- c) Follow the Post Orders.

The Facility was short-staffed on November 25, 2020. Grievant called an adjoining Facility and requested assistance. Officer H left that facility and came to Grievant's Facility. Grievant gave Officer H a "general rundown of what to do." Grievant told Officer H all keys and equipment were present. Officer H assumed the Front Entry post at 8:02 a.m. Grievant did not give the Front Entry Post Orders to Officer H for Officer H to read and sign. Officer H began her duties at the Front Entry post without having read the Post Orders describing her duties. Grievant told Officer H to observe and not to open the front gate. At 8:04 a.m., Grievant left the Front Entry post area in order to assist with conducting inmate count. The count cleared at 8:08 a.m.

At 8:05 a.m., Mr. RP went to the armory at Front Gate entry and noticed Officer H was uncertain about what she needed to do. He left at 8:06 a.m.

When Mr. RP returned to his work area, he asked Mr. MP to go to the Front Entry gate to give assistance to Officer H. Mr. MP was a former Lieutenant at the Facility. Mr. RP said Grievant put Officer H at the Front Entry post with very little instruction and had left her alone.

At 8:35 a.m., Mr. MP walked to the Front Gate and observed that Officer H was by herself. He asked Officer H if she needed help and she said yes. Mr. MP asked Officer H if she had read the post orders and Officer H said she did not know where the post orders were. He began to explain the telephone, laundry check-in sheet, and how offenders checked in. Officer H asked Mr. MP what certain buttons did, what to do when someone enters the armory, and how to turn on the laundry lights. Mr. MP showed Officer H how to lock the front door. As Mr. MP was getting Officer H to begin the check-in sheet, Grievant returned to the Front Entry gate. Mr. MP pushed the button to allow Grievant to enter. Grievant told Mr. MP not to worry about showing Officer H what to do and that she would take care of it. Grievant said she would tell Officer H what to do. Mr. MP left the Front Entry gate at 8:40 a.m.

Officer H left the Front Entry post at 9:47 a.m.

On January 19, 2021, the agency issued to the grievant a Group II Written Notice of disciplinary action for failure to follow instructions and a Group III Written Notice with demotion,

transfer, and disciplinary pay reduction for gross negligence.<sup>2</sup> The grievant timely grieved these disciplinary actions, and a hearing was held on July 28, 2021.<sup>3</sup> In a decision dated August 17, 2021, the hearing officer determined that the Group II Written Notice must be rescinded but that the Group III Written Notice and related penalties must be upheld.<sup>4</sup> Although he concluded that the evidence did not support the charged misconduct of gross negligence, the hearing officer nevertheless found that the grievant failed to follow policy under circumstances meriting a Group III Written Notice.<sup>5</sup> The hearing officer also determined that no mitigating circumstances existed to reduce the disciplinary action.<sup>6</sup>

The grievant now appeals the hearing 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.”<sup>7</sup> 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.<sup>8</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In her request for administrative review, the grievant appears to challenge the hearing officer’s conclusions as to whether she received adequate training to follow the policy at issue in the Group III Written Notice.<sup>10</sup> The grievant also argues that the agency failed to timely produce evidence and improperly questioned a witness at the hearing.<sup>11</sup>

Hearing officers are authorized to make “findings of fact as to the material issues in the case”<sup>12</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>13</sup> 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.<sup>14</sup> Thus, in disciplinary actions, the hearing officer

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<sup>2</sup> Agency Exs 1, 2; *see* Hearing Decision at 1.

<sup>3</sup> Hearing Decision at 1.

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 5-6.

<sup>6</sup> *Id.* at 6-7.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>9</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>10</sup> *See Request for Administrative Review*.

<sup>11</sup> *Id.*

<sup>12</sup> Va. Code § 2.2-3005.1(C).

<sup>13</sup> *Grievance Procedure Manual* § 5.9.

<sup>14</sup> *Rules for Conducting Grievance Hearings* § VI(B).

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.<sup>15</sup> 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.

Here, the hearing officer found that the grievant failed to follow policy by not having Officer H read and sign the Front Entry Post Order before assuming that post, and that the circumstances justified elevating the grievant's offense to the Group III level:

The Front Entry post was the most important post at the Facility. The Front Entry Officer controlled who entered or exited the Facility. The Front Entry Officer determine[d] who could enter the armory where weapons were stored. If the Front Entry Officer mistakenly pushed the wrong button on a control panel, an inmate or visitor could enter or exit the Facility without authorization. The Front Entry Officer could allow an unauthorized person to enter the armory and obtain access to weapons. . . .

. . . . Grievant acted contrary to policy because she did not let Officer H read the Front Entry Post Order. . . .

. . . . [H]aving an employee sign a post order before assuming that post was a well-known expectation. Grievant knew or should have known she was obligated to have Officer H read and sign the Front Entry Post Order before assuming that post.<sup>16</sup>

The record contains evidence to support the hearing officer's conclusions. The written post orders for Shift Commander and Front Entry both articulate that all corrections staff must read and sign the post order before assuming a post, with the order to be counter-signed by their supervisor.<sup>17</sup> At the hearing, multiple witnesses testified as to the vital importance of the Front Entry post, in part because of armory access, and to the requirement that anyone assuming that post must read and sign the post order.<sup>18</sup> Although the grievant argues that she did not receive adequate training to perform the responsibilities she was given as shift commander unsupervised at the time of her offense, neither her hearing testimony nor her arguments on appeal specifically claim that she was unaware of the basic requirements regarding post orders.<sup>19</sup> Furthermore, another agency witness testified that he assisted in training the grievant and that the requirement for employees to sign their post orders was included in that training.<sup>20</sup> Because the hearing officer's

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<sup>15</sup> *Grievance Procedure Manual* § 5.8.

<sup>16</sup> Hearing Decision at 6. The hearing officer noted that, under DHRM Policy 1.60, *Standards of Conduct*, failure to follow instructions is typically a Group II offense, but that an agency may impose a more severe penalty for instances of misconduct with more serious potential consequences. *Id.* at 5-6.

<sup>17</sup> Agency Ex. 22, at 63; Agency Ex. 23, at 87.

<sup>18</sup> *See, e.g.*, Hearing Recording at 1:39:40-1:41:15, 1:42:05-1:45:45 (Major A's testimony); *id.* at 2:01:13-2:03:20 (Major R's testimony).

<sup>19</sup> *See, e.g., id.* at 4:07:35-4:08:32 (Grievant's testimony).

<sup>20</sup> *Id.* at 4:37:45-4:39:36 (Lieutenant's testimony).

conclusions as to the misconduct charged and penalty imposed have an evidentiary basis and are not otherwise unreasonable, EDR will not disturb the hearing decision on these grounds.

EDR also cannot conclude that the grievant's other two points on appeal present a basis for remand. Although the grievant alludes to multiple failures by the agency to comply with the grievance procedure, the record indicates that these issues had been resolved by the time of the hearing. Typically, the remedy for a party's failure to comply with the grievance procedure is for the non-compliant party to correct the non-compliance.<sup>21</sup> When a grievance is pending for hearing, the hearing officer may be in a position to consider whether the non-compliance will affect the hearing and to order further relief as appropriate.<sup>22</sup> Here, however, the grievant's representative confirmed at the hearing that allegations of non-compliance, including with respect to document production, had already been adjudicated such that the grievant sought no further relief from the hearing officer.<sup>23</sup> Moreover, the grievant does not indicate on appeal how the agency's earlier non-compliance might have prevented either a full opportunity for the grievant to present her case or a fair analysis by the hearing officer. Finally, upon a thorough review of the hearing record, EDR identifies no instance where the hearing officer failed to conduct the hearing in an equitable and orderly fashion, including with respect to civil examination of witnesses.

#### 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 hearing decision once all timely requests for administrative review have been decided.<sup>24</sup> 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.<sup>25</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>26</sup>

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<sup>21</sup> See generally *Grievance Procedure Manual* § 6; see, e.g., EDR Ruling No. 2020-4972.

<sup>22</sup> See *Rules for Conducting Grievance Hearings* § IV(F); see, e.g., EDR Ruling No. 2020-4972.

<sup>23</sup> See Hearing Recording at 4:51:50-4:52:40.

<sup>24</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>25</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>26</sup> *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).