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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2024-5685
April 18, 2024

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 12053. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12053, as found by the hearing officer, are as follows:¹

Prior to her dismissal, the Department of Juvenile Justice [(the "agency")] employed Grievant as a Juvenile Correction Specialist at one of its facilities. Grievant had worked for the Agency for almost 19 years. No evidence of prior active disciplinary action was introduced during the hearing.

As a Juvenile Correction Specialist, Grievant annually received "Handle with Care" training for self-defense and use of force with the Agency's juvenile residents. Superintendent described the techniques that Grievant would have been taught and approved to use when a resident was entering her personal space. Superintendent testified that the Handle with Care training teaches appropriate techniques along the use of force continuum beginning with verbal prompts and including getting into a non- defensive posture when communicating with a resident.

On the afternoon of November 28, 2023, Grievant was working on a Unit in the Facility.

¹ Decision of Hearing Officer, Case No. 12053 ("Hearing Decision"), Mar. 22, 2024, at 2-5 (footnotes omitted).

Grievant testified that there were 14 residents on the Unit at that time. Residents would alternate spending time in their rooms and having group time in the common area.

By 2:50 pm, there were approximately six residents in the common area of the Unit, and it was time for them to return to their rooms for a break period.

Grievant testified that she had instructed the residents to go to the doors leading into their rooms so that they could “go down” for the break period. Grievant began the process of unlocking doors to enable residents to enter their assigned rooms.

Resident X did not follow Grievant’s instruction to go to his room.

As Grievant left the door of another resident’s room, Grievant began to walk across the common area of the Unit. At approximately the same time, but from the opposite side of the Unit, Resident X began to walk across the common area toward Grievant. Video footage shows Grievant and Resident X walking toward one another at approximately 2:51:44 pm. Grievant testified that as she and Resident X approached one another she was instructing him to go to his room.

At approximately 2:51:47 pm, the video footage shows Resident X’s left hand touch Grievant’s right shoulder area appearing to push Grievant with Grievant turning toward her right side and taking a step backward. Resident X and Grievant continue to face each other and Resident X takes three steps backward away from Grievant as Grievant takes approximately three steps toward Resident X.

At approximately 2:51:51 pm, Grievant and Resident X each take a step toward each other and then Grievant turns to her left side and Resident X turns toward his right side and they both walk in the same direction for approximately two steps. At approximately 2:51:53 pm, Grievant appears to push Resident X initially with her right arm bent and then extending her right arm to push him in his upper chest and neck area. Resident X takes approximately three steps backward away from Grievant.

Resident X and Grievant are then facing each other. At approximately 2:51:55 pm, Grievant extends her right arm out straight in front of her with her palm facing toward Resident X and her fingers pointing toward the ceiling. Grievant asserted in her response to the Agency dated December 4, 2023, that she “stuck out [her] right arm and explained to [Resident X] that if [she] could touch him he was [too] close to [her].”

Resident X takes two steps toward Grievant with his head bowed and his arms hanging by his side, Grievant continues to hold her right arm extended toward Resident X. At approximately 2:51:57 pm, as Resident X takes a third step toward her, Grievant appears to lean towards him and begin to step forward as the left side

of his face and neck area appear to come into contact with her extended right hand. Grievant's right arm appears to bend and then her right hand appears to push up into the left side of Resident X's face, pushing his face toward his right side and away from her. As Resident X is pushed away from Grievant, he takes a step to his right side and away from Grievant and raises his left hand to the lower left side of his face near his lip. Resident X continues to hold the lower left side of his face as he moves away from Grievant.

The video footage showed Resident X enter his room at approximately 2:52:51 pm.

The video footage showed Grievant approach the door to Resident X's room shortly after he entered it. Grievant testified that she asked Resident X if he was okay and he said "yes." Grievant testified that she told Resident X that they were going to have to work on his playing and that Resident X responded "I know [Grievant], I'm going to work on it." Grievant testified that she went to Resident X's door for periodic checks and he never said anything more about the incident.

Grievant did not submit an incident report regarding her interaction with Resident X. Grievant also did not submit a discipline report for Resident X engaging in horseplay.

On December 4, 2023, a security coordinator assigned to the Facility submitted an Institutional Incident Report noting that while reviewing Rapid Eye video footage of the Unit from November 28, 2023, he observed footage that showed an incident between Grievant and a resident. The resident observed on the video footage was determined to be Resident X.

On December 4, 2023, Resident X was medically assessed by a nurse and no injuries were noted.

Also on December 4, 2023, the Agency issued to Grievant a "Notice of Intent to Issue Disciplinary Action." Grievant provided the Agency with a written response to the "Notice of Intent to Issue Disciplinary Action" on that same day.

Special Agent investigated a separate incident that occurred when two residents secured a third resident in a room on the Unit on November 28, 2023. Special Agent interviewed Grievant on December 5, 2023, regarding that separate incident. During the interview, Grievant mentioned her interaction with Resident X.

Special Agent also interviewed Resident X on December 5, 2023. Special Agent's summary of that interview noted that Resident X thought Grievant was "playing around" but that she slapped him and then pinched him because he was taking his time "going down." Special Agent's report noted that Resident X later clarified that Grievant did not slap him, but only pinched him. Grievant denied

“pinching” Resident X and suggested that Resident X’s face pressing into her fingernail could have been perceived by Resident X as a “pinch.”

Resident X also told Special Agent that after Resident X was secured in his room, Grievant came to the window in his door and asked if he was okay. According to Special Agent’s summary of the interview with Resident X, Resident X also indicated that the incident caused bleeding to his lip.

On December 6, 2023, the agency issued to the grievant a Group III Written Notice with termination, charging her with assaulting a resident.² The grievant timely grieved the disciplinary action, and a hearing was held on February 27, 2024.³ In a decision dated March 22, 2024, the hearing officer determined that the agency presented sufficient evidence to support its disciplinary action.⁴ The hearing officer further found that “no mitigating circumstances exist to reduce the disciplinary action.”⁵ The grievant now appeals the 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 her request for administrative review, the grievant maintains that her contact with Resident X was not assault because she “had [her] hand in his chest area, and at one point on top of the head area as he lowered it while playing, but never did [she] push him, or slap him.” Essentially, the grievant challenges the hearing officer’s factual finding that she pushed Resident X, meriting a Group III Written Notice with termination.

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

² Agency Exs. at 6-8; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 8.

⁵ *Id.* at 9.

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).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

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 her decision, the hearing officer found that, in video evidence of the relevant incident, the grievant "appears to push Resident X initially with her right arm bent and then extending her right arm to push him in his upper chest and neck area. Resident X takes approximately three steps backward away from Grievant."¹³ Then the grievant, with hand extended, "appears to lean towards [Resident X] and begin to step forward as the left side of his face and neck area appear to come into contact with her extended right hand. Grievant's right arm appears to bend and then her right hand appears to push up into the left side of Resident X's face, pushing his face toward his right side and away from her."¹⁴ This description is consistent with EDR's independent review of the video footage in the record,¹⁵ and accordingly EDR has no basis to disturb the hearing officer's finding that the grievant pushed a resident.

To the extent the grievant challenges the hearing officer's finding that her conduct merited discipline at the Group III level, EDR likewise finds no grounds to disturb the hearing decision on this basis.¹⁶ The hearing officer reasoned that a Group III Written Notice was consistent with law and policy under the circumstances, "[g]iven the nature of the offense as well as Grievant's role in the care of Resident X."¹⁷ Per DHRM Policy 1.60, *Standards of Conduct*, discipline at the Group III level is appropriate for "acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations," such as "safety/health infractions that endanger" others.¹⁸ The hearing officer reasonably concluded that the grievant's act of pushing a minor in state care and custody could rise to this level.

In summary, the hearing officer clearly found that, based on the evidence in the record, the agency had presented sufficient evidence to carry its burden to establish discipline at the Group III level. 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

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ Hearing Decision at 3.

¹⁴ *Id.*

¹⁵ Agency Exs. at 72; Agency Video Ex. 1, 2.

¹⁶ The grievant argues that she was terminated for slapping Resident X – misconduct which the hearing officer did not uphold. However, our review of the Group III Written Notice does not support the grievant's view that it was predicated only on a "slap," versus a push. Instead, the Written Notice describes "assaultive" behavior, which the hearing officer found was supported by the evidence. *See* Agency Exs. at 6-7; Hearing Decision at 7 ("A slap or a punch is not required for physical contact to rise to the level of misconduct . . .").

¹⁷ Hearing Decision at 8.

¹⁸ DHRM Policy 1.60, *Standards of Conduct*, Att. A: "Examples of Offenses Grouped by Level," at 2.

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.¹⁹

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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²

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¹⁹ See, e.g., EDR Ruling No. 2020-4976.

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).