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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2024-5651  
February 1, 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 12009. For the reasons set forth below, EDR will not disturb the hearing decision.

**FACTS**

The relevant facts in Case Number 12009, as found by the hearing officer, are as follows:<sup>1</sup>

Prior to his dismissal, Grievant worked for the Department of Corrections as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On December 19, 2022, Grievant was on post in the yard outside the inmate dining area. Grievant was overseeing the movement of inmates as inmates from a housing unit received lunch.

At approximately 1324, three inmates exited the medical unit and came into the yard area.

The inmates from the medical unit were not supposed to be in the yard.

Grievant instructed the inmates from the medical unit to step back inside the medical unit. Two of the inmates immediately followed Grievant's instruction.

The third inmate, Inmate C, did not immediately follow Grievant's instruction.

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<sup>1</sup> Decision of Hearing Officer, Case No. 12009 ("Hearing Decision"), December 4, 2023, at 2-6 (internal citations omitted).

Video footage showed an interaction between Inmate C and Grievant in the yard outside of the medical unit. The video footage also showed Inmate C and Grievant interacting as Inmate C re-entered the door to the medical unit with Grievant walking toward Inmate C as Inmate C re-entered the medical unit and the door closed behind Inmate C. After the medical unit door closed behind Inmate C, Grievant continued to walk toward the door and then opened the door and entered the medical unit.

Grievant entered the medical unit in order to put Inmate C in the holding cell in the medical unit.

Once Grievant was inside the medical unit, Grievant ordered Inmate C to go into the holding cell. The number of times Grievant ordered Inmate C to go into the holding cell varied among differing accounts, but at some point during the exchange, Inmate C put his hands behind his back and told Grievant he would not go into the cell.

Grievant put his hands on Inmate C to get Inmate C into the holding cell.

Grievant closed the holding cell door and exited the medical unit to return to his post in the yard.

Grievant returned to the medical unit to prepare for count at approximately 1740 and by 1750 Grievant had released Inmate C from the holding cell. Inmate C returned to his housing unit.

Grievant did not advise his supervisor or the watch commander that Grievant had put Inmate C in the holding cell in the medical unit. Grievant did not advise Grievant's supervisor or the watch commander of any of the circumstances that resulted in Inmate C being in the holding cell in the medical unit from approximately 1326 to 1750.

Grievant did not prepare an internal incident report regarding the circumstances that resulted in Inmate C being placed in the holding cell in the medical unit.

At approximately 1815, Inmate C filed an emergency grievance alleging that he had been assaulted by a corrections officer who Inmate C alleged "grabbed [Inmate C] and thrashed [Inmate C] around the medical waiting room" and who, according to Inmate C, "said over and over he was going to beat [Inmate C's] bitch ass."

Captain had just come on shift and was the watch commander on duty when Inmate C filed the emergency grievance. Captain interviewed Inmate C. Captain observed bruising over Inmate C's right eye and bruising and scratches on the right

and left side of Inmate C's neck. Captain took photographs of the scratches and bruises he observed on Inmate C. Inmate C had initially told a corrections officer that he received the bruises playing basketball, but then Inmate C submitted the emergency grievance. When Captain asked Inmate C why Inmate C was changing his story, Inmate C said he initially said the injuries occurred playing basketball because the officers were still working on the same shift as Grievant and Inmate C was fearful about reporting the incident while Grievant was still on shift.

Based on information Captain received from Inmate C as to the timing and circumstances of the alleged incident, Captain reviewed video footage of the yard outside the medical unit. Captain was able to verify that there was an interaction in the yard between Grievant and Inmate C on the video footage.

After Captain confirmed that there was an interaction between Grievant and Inmate C on video footage within the time frame described by Inmate C, Captain took Inmate C to the medical unit and emailed the photographs of Inmate C's injuries to the Warden and the Sergeant.

Warden instructed Sergeant to investigate the allegations made by Inmate C.

Sergeant began his investigation into Inmate C's allegations on December 20, 2022.

Sergeant interviewed Inmate C and Grievant.

Sergeant testified that Inmate C told Sergeant that Inmate C and others came out of the medical unit into the yard and Grievant instructed them to go back inside by giving a hand gesture for the inmates to go back inside. Inmate C told Sergeant that Inmate C told Grievant that he did not understand sign language and that Grievant was going to have to talk to him. Inmate C told Sergeant that Grievant started walking toward Inmate C, and they engaged in dialogue. Inmate C told Sergeant that Inmate C did ultimately go back into the medical unit. Inmate C told Sergeant that Grievant then came into the medical unit and told Inmate C to step into the holding cell. Inmate C admitted to Sergeant that he refused to go into the holding cell, stepped back, put his hands behind his back, and told Grievant that he was going to have to call someone. Sergeant testified that Inmate C told him that Grievant gave Inmate C another directive to go inside the holding cell. That's when, according to Inmate C, Grievant grabbed Inmate C by the head and shoulders and threw Inmate C into the holding cell. Inmate C told Sergeant that Grievant stood over Inmate C. Inmate C told Sergeant that Inmate C asked Grievant what was going on and Grievant closed the door to the holding cell and left.

Sergeant also interviewed witnesses identified by Inmate C. Although there was no camera capturing video footage of the medical vestibule area near the

holding cell in the medical unit, Sergeant was able to identify other potential witnesses by reviewing video footage from the dental hall where inmates and others in the area may have had a view of activities in the vestibule area and the holding cell area. Video footage of the dental hall area at the time of the events in question shows inmates seated and apparently waiting for treatment suddenly rising from their chairs and moving forward in the direction of the medical vestibule area. The inmates appear as though they are reacting and looking at something occurring in the medical vestibule area and out of view of the dental hall camera.

In addition to Inmate C and Grievant, Sergeant interviewed five witnesses regarding the incident. Four of the witnesses were inmates and the other witness was a nurse. Although video footage from the dental hall shows two officers in the area at the time of the incident, Sergeant testified that when he spoke to those officers about the incident, they told him they did not see anything.

Sergeant interviewed the nurse. The nurse told Sergeant that she saw Grievant close the holding cell door and exit the medical unit. The nurse said that when she went to the area where inmates were waiting in the medical units' vestibule area, she heard inmates talking. When she asked the inmates about it, the inmates told her that a corrections officer had dragged another inmate by his shirt collar and threw him into the holding cell. The nurse told Sergeant that she then went to the window at the door to the holding cell and asked the inmate in the holding cell [Inmate C] what happened and if he was ok and Inmate C just shook his head.

Sergeant testified that he believed the information provided by the inmate-witnesses corroborated Inmate C's version of events and that he had no reason to disbelieve the information provided by the inmate-witnesses.

The inmate-witnesses did not testify during the hearing, but the information they provided to Sergeant is included in Sergeant's report.

Inmate-witness G told Sergeant that while exiting the medical unit with Inmate C, the officer waved them back into the medical unit. Inmate-witness G told Sergeant that words were exchanged between Inmate C and the officer, but that Inmate-witness G did not know the extent of the words that were exchanged. Inmate-witness G told Sergeant that as they were retreating into the medical unit, Inmate C made a barking sound toward the officer and closed the door. Inmate-witness G told Sergeant that after about 10-15 seconds the officer entered the medical unit and told Inmate C to enter the time out room. Inmate-witness G told Sergeant that Inmate C placed his hands behind his back and told the officer "you need to call someone." Inmate-witness G told Sergeant that the officer then grabbed Inmate C around the collar, slammed Inmate C to the ground and dragged Inmate C into the room. Inmate-witness G advised that Inmate C got to his feet and the officer told him to get back in or "I will knock you the fuck out" several times.

Inmate-witness G told Sergeant that Inmate C repeatedly said “you need to call someone.” Inmate-witness G told Sergeant that the officer then slammed the door to the room where Inmate C was placed and left the medical unit.

Inmate-witness M told Sergeant that within 10 seconds of the other inmates returning to the medical unit, the officer came in and told Inmate C to get into the cell. Inmate-witness M told Sergeant that Inmate C asked the officer “why are you doing this” and said “you need to call somebody” with his hands behind his back. Inmate-witness M told Sergeant that the officer never responded and without notice grabbed Inmate C by the collar and dragged Inmate C into the holding cell. Inmate-witness M told Sergeant that as Inmate C got to his feet, the officer told Inmate C that he was going to knock Inmate C out.

Inmate-witness E told Sergeant that he saw Inmate C on the ground with the officer standing over him with his fists balled up and saying “I’ll knock you the fuck out.” Inmate-witness E told Sergeant that Inmate C asked what he did and what was going on. Inmate-witness E told Sergeant the officer walked out of the holding cell, slammed the door, and walked out of the medical unit.

Inmate-witness A told Sergeant that while Inmate-witness A was waiting to be seen in the medical unit, Inmate-witness A got up when he heard a commotion. Inmate-witness A told Sergeant that Inmate-witness A saw a male correctional officer aggressively pushing around an inmate. Inmate-witness A told Sergeant that the correctional officer pushed the inmate to the floor and was standing in a motion to entice the inmate. Inmate-witness A told Sergeant that the correctional officer then pushed the inmate into the holding cell.

Sergeant prepared a report of his findings and his conclusions. Sergeant’s report also includes his summary of his interviews of the witnesses.

The agency issued to the grievant a Group III Written Notice on March 17, 2023 with termination for unsatisfactory performance, failure to follow instructions or policy, and inmate abuse.<sup>2</sup> The grievant timely grieved the disciplinary action, and after it was determined that the applicable circuit court declined jurisdiction and that EDR would therefore be the proper entity to resolve the matter, a hearing was held on October 26, 2023.<sup>3</sup> In a decision dated December 4, 2023, the hearing officer determined that the agency had presented sufficient evidence to support a Group III Written Notice due to the preponderance of evidence that suggests the grievant used unreasonable force on the inmate, including information from various witnesses and inmates, and the evidence of bruising and abrasions on the inmate.<sup>4</sup> The hearing officer likewise determined that the issuance of a Group III Written Notice pursuant to these circumstances was consistent with

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<sup>2</sup> Hearing Decision at 1; Agency Ex. 1.

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

<sup>4</sup> *Id.* at 8-10.

law and policy.<sup>5</sup> Finally, the hearing officer also concluded that no mitigating circumstances existed to reduce the disciplinary action.<sup>6</sup> 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.”<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.

On appeal, the grievant contests the hearing decision on two grounds. First, he contends that the agency did not comply with the proper deadline for submission of exhibits, stating that they submitted their initial information a few hours after the 5:00 p.m. deadline on October 16, 2023. He argues that this noncompliance “created an unfair advantage” in that he was not able to appropriately review their documentation prior to the deadline.<sup>10</sup> Second, he argues that the hearing officer’s decision was not based on evidence, but rather on how “convincing [] or persuasive the hearing officer found [him] to be during [his] testimony,” and that he did not receive a “fair assessment of the actual facts and evidence submitted.”<sup>11</sup>

#### *Submission of Evidence*

The grievant takes issue with the fact that the agency submitted their evidence for the hearing a few hours past the provided deadline, arguing that doing so put him at a disadvantage by not properly being able to review the proffered evidence. The *Rules for Conducting Grievance Hearings* do not explicitly state that a hearing officer must exclude any evidence admitted after a certain deadline provided to the parties. The *Rules* in fact encourage hearing officers to consider any and all evidence relevant in administering a decision. Indeed, it is stated that the hearing does not follow the technical rules of evidence, and that “most probative evidence . . . is admitted.”<sup>12</sup> It is encouraged to be lenient in what is admitted and focus on the probative value of the evidence, not certain technicalities.

It should be noted that the *Rules* do allow hearing officers to exclude certain evidence, including evidence “not timely exchanged consistent with the hearing officer’s orders.”<sup>13</sup>

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<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

<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> Request for Administrative Review.

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

<sup>12</sup> *Rules for Conducting Grievance Hearings* § IV(D).

<sup>13</sup> *Id.*

Nevertheless, this determination is ultimately left to the discretion of the hearing officer. If the hearing officer finds that the delay in the submission of evidence is material and in fact causes prejudice to the opposing party, then it would be understandable to exclude such evidence.<sup>14</sup> Here, however, that does not seem to be an issue. According to the grievant, the agency submitted their evidence three hours after the provided deadline of 5:00 p.m. on October 16, 2023, ten days before the date of the hearing. While the grievant argues that this three-hour delay placed a disadvantage on him by not allowing him to view the evidence prior to the provided deadline, EDR cannot find this argument sufficiently persuasive. Given that the evidence was submitted ten days before the hearing, a delay of three hours does not appear to have any material disadvantage in the amount of time allowed to review such evidence. Further, this delayed admission was not disputed by the grievant in the hearing itself when the hearing officer asked if the grievant had any objections to the admission of the agency's evidence.<sup>15</sup> For these reasons, EDR declines to disturb the hearing decision on the grounds of the timeliness of the agency's proffered evidence.

### *Hearing Officer's Consideration of Evidence*

The grievant also argues that the hearing officer did not properly base her decision on the evidence, testimonies, facts, or exhibits, but instead based her decision on how convincing or persuasive she found the grievant to be during his testimony. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>16</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>17</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>18</sup> 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.<sup>19</sup> 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.

Further, 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. 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

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<sup>14</sup> See *Rules for Conducting Grievance Hearings* § III(E).

<sup>15</sup> Hearing Recording at 1:50:15-1:50:45 (Agency Witness Testimony).

<sup>16</sup> Va. Code § 2.2-3005.1(C).

<sup>17</sup> *Grievance Procedure Manual* § 5.9.

<sup>18</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>19</sup> *Grievance Procedure Manual* § 5.8(2).

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, EDR finds that the hearing officer properly considered the available evidence and testimony in making her decision. While the grievant may be frustrated when considering the language of certain evidence or testimony being more "persuasive" to the hearing officer, in this context, "persuasive" is being used in an objective mode of consideration. It is the hearing officer's duty to consider all proffered evidence and testimony in order to make conclusive findings of fact and an ultimate decision. In this instance, there is no conclusive, video evidence of the alleged incident itself, and for that reason, the grievant is arguing that the hearing officer had no objective basis for her decision. However, in such situations, the hearing officer would then review all record evidence and make her findings and determination based on the preponderance of the evidence. Here, the agency offered multiple testimonies suggesting that the grievant used unreasonable, physical force on the inmate in question, based on their interview of the inmate and conducting an investigation.<sup>20</sup> The agency determined from the investigation that the timeframe of the incident lined up with the time the grievant was in the holding cell with the inmate.<sup>21</sup> The investigation itself included five witnesses (four inmates, including the inmate who was allegedly assaulted, and a nurse) in the area at the time of the incident who corroborated the allegation that the grievant used at least some force on the inmate, grabbing him and throwing him to the ground.<sup>22</sup> Finally, in addition to testimony and the investigation report, the hearing officer also relied on the photo evidence of the bruises and signs of force on the inmate.<sup>23</sup>

The hearing officer then had to weigh all of this evidence with the grievant's testimony and made the ultimate determination that the grievant's testimony alone was not sufficiently persuasive to outweigh the proffered evidence and testimony by the agency.<sup>24</sup> In addition to the agency's evidence outweighing the grievant's evidence, the hearing officer noted that the grievant's argument regarding the credibility of the inmates was not persuasive, affirming that their statements were consistent and corroborated the inmate's account of the events.<sup>25</sup> For these reasons, the hearing officer found that the grievant engaged in the alleged misconduct. While the grievant's frustration that there is no video evidence of the incident is understandable, the burden of proof applicable in grievance hearings is a "preponderance of evidence" standard, which essentially allows for the hearing officer to uphold the agency's discipline if it is more likely than not that the alleged misconduct occurred.<sup>26</sup> The hearing officer determined that the misconduct occurred after weighing the evidence and testimony offered by both parties, and EDR does not find there to be an abuse of discretion in doing so. For these reasons, EDR declines to disturb the hearing decision on the grounds of the hearing officer's consideration of evidence.

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<sup>20</sup> See, e.g., Hearing Recording at 10:00-15:00, 39:00-43:00 (Agency Witness Testimonies).

<sup>21</sup> *Id.* at 18:20-18:50.

<sup>22</sup> *Id.* at 48:45-49:30; see also Agency Ex. 2.

<sup>23</sup> Hearing Decision at 8-9; Agency Exs. at 11-13.

<sup>24</sup> Hearing Decision at 9.

<sup>25</sup> *Id.*

<sup>26</sup> The *Grievance Procedure Manual* defines "preponderance of the evidence" as "[e]vidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence." *Grievance Procedure Manual* § 9.



### 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>25</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>26</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>27</sup>

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