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***Department Of Human Resource Management***

***Office of Employment Dispute Resolution***

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## ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2024-5659
February 14, 2024

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 11942. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

## FACTS

The relevant facts in Case Number 11942, as found by the hearing officer, are as follows:[1]

> Grievant was a correctional officer hired at the [Agency Facility 1]. Grievant was relocated under a relocation agreement to [Agency Facility 2]. The actions described in the written notice were actions that occurred at [Facility 2]. The written notice was issued by her home post of [Facility 1]. Grievant signed a relocation contract with the [agency]. This document never designated a jurisdiction or venue location for a dispute of this contract.
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> Grievant's post at [Facility 2] was a raised enclosed area above the inmate open room. The Inmate in question had a cleaning job that permitted him to spend additional time in the inmate open room. Inmate often stopped to talk to Grievant. Grievant stated she listened to Inmates' concerns and would respond sometime[s] with talk of religion or her family's activities. Grievant stated Inmate made other overtures to her but Grievant stated she did not respond to any suggestions or phone calls on Inmate's part.
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> Grievant stated Inmate did call her phone, but she never answered. Grievant stated she did not know how Inmate had her phone number. Grievant stated she did not give the phone number to him. Grievant did not report this action of Inmate to her superior.

[1] Decision of Hearing Officer, Case No. 11942 ("Hearing Decision"), January 10, 2024, at 3 (citations and footnotes omitted).

> Grievant stated Inmate gave her a written document Inmate described as a poem. Grievant stated she did not read the document and she put it in the trash. Grievant did not report this action of the Inmate to her superior.
>
> Grievant stated Inmate suggested plans for a bright future and that Grievant could talk to Inmate's mother. Grievant stated she was not interested and did not ever attempt to call Inmate's mother. Grievant did not report this action of the Inmate to her superior.
>
> Grievant stated Inmate offered her a second phone. Grievant did not respond to this offer. Grievant did not report this action of Inmate to her superior.
>
> The investigative report contained statements of Grievant made to the investigator, copies of phone records from the prison to Grievant's cell number (no phone call was answered) and redated statements of the Inmate. Agency was able to ascertain that Grievant did not report any of Inmate's boundary violations but had no concrete evidence Grievant responded to Inmate. . . .

On January 18, 2023, the agency issued to the grievant a Group III Written Notice with termination, charging the grievant with violating agency policies related to fraternization and non-professional relationships with inmates.[2] The grievant timely grieved the disciplinary action, and a hearing was held over two sessions on October 4 and November 16, 2023.[3] In a decision dated January 10, 2024, the hearing officer determined that, although the evidence was insufficient to prove fraternization, the "Grievant made a serious error in not reporting Inmate's behavior . . . to her superior."[4] Accordingly, the hearing officer upheld the agency's disciplinary action and, moreover, found no mitigating circumstances sufficient to reduce it.[5]

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."[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

[2] Grievant Ex. 1; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 5.
[5] *Id.* at 4-5.
[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.

In her request for administrative review, the grievant contends that, because the hearing officer did not sustain misconduct related to fraternization or unprofessional conduct with the Inmate, discipline was unwarranted at the Group III level.[9] The grievant maintains that the sustained misconduct was essentially a failure to follow policy – which, without an additional basis for a more severe penalty, is typically a Group II offense.[10] In response, the agency has argued that any violation of its policy on employee relationships with inmates, including failure to report, is presumptively a Group III offense.[11]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[12] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[13] 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.[14] 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.[15] 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 issue on appeal is essentially whether the hearing officer erred in finding that disciplinary action at the Group III level was consistent with law and policy. Disciplinary levels and their appropriate applications are defined by DHRM Policy 1.60, *Standards of Conduct*. The grievant argues that the misconduct sustained would merit, at most, discipline at the Group II level. According to Policy 1.60, a Group II Written Notice would be appropriate for

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[8] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[9] Request for Administrative Review at 2.
[10] *Id*. at 2-3.
[11] In its response to the grievant's Request for Administrative Review, the agency appears to challenge the hearing officer's conclusions regarding whether the grievant engaged in fraternization under its policies. However, any such challenge is untimely. Under the grievance procedure, "[r]equests for administrative review must be in writing and ***received by*** EDR within 15 calendar days of the date of the original hearing decision." *Grievance Procedure Manual* § 7.2(a) (emphasis in original). A hearing officer's findings become final once the period for requesting administrative review has closed. Here, the hearing decision was issued on January 10, 2024, and therefore any findings not challenged via administrative review were final as of January 25, 2024. EDR received the agency's response brief on January 26, 2024. Accordingly, any challenge to the hearing officer's findings therein is untimely and will not be considered. The agency's brief is timely solely as a rebuttal to the grievant's request for administrative review and has been considered as such.
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.
[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.

> acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that seriously impact business operations and/or constitute neglect of duty involving major consequences, insubordinate behaviors and abuse of state resources, violations of policies, procedures, or laws.[16]

Examples include failure to follow a supervisor's instructions, failure to comply with policy, violation of safety rules not resulting in threat to bodily harm, and leaving work without permission.[17] By contrast, a Group III Written Notice is merited for

> acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; indicate significant neglect of duty; result in disruption of the workplace; or other serious violations of policies, procedures, or laws.[18]

In sum, Policy 1.60 articulates general standards for determining the appropriate level of discipline that also allow for consideration of an agency's specific operational concerns in determining the severity of an offense. Therefore, although a failure to follow policy might ordinarily merit discipline at the Group II level, Group III discipline may be warranted by the type of policy involved, as well as other aggravating circumstances, if proven by the agency.

In this case, the hearing officer found that the Inmate's overtures toward the grievant "should definitely have been reported to Grievant's superior as clear infraction[s] as an attempt to go beyond Grievant's required level of professionalism."[19] This finding is supported by the agency's Operating Procedure 135.2, *Rules of Conduct Governing Employees Relationships with Inmates and Probationers/Parolees*.[20] Among other requirements, the policy imposes a "continuing affirmative duty to disclose to their supervisors or other management officials any staff **or inmate** . . . boundary violations . . . ."[21] The hearing decision is fairly read to conclude that this affirmative duty required the grievant to report occurrences such as the Inmate calling her phone, trying to connect her with his mother, offering her a second phone, and writing her a poem. The hearing officer found, and the parties do not dispute, that the grievant violated this policy requirement.

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[16] DHRM Policy 1.60, *Standards of Conduct*, at 8.
[17] DHRM Policy 1.60 Att. A: "Examples of Offenses Grouped by Level."
[18] DHRM Policy 1.60, *Standards of Conduct* at 8-9.
[19] Hearing Decision at 4.
[20] Agency Ex. 2.
[21] *Id.* at 8 (emphasis added). The Written Notice narrative specifically invokes this same language, asserting: "Employees have a continuing affirmative duty to disclose to their supervisors or other management officials any inmate boundary violations and any conduct that violates this behavior that is inappropriate or compromises safety of staff, inmates, probationers/parolees, or the community." Grievant Ex. 1, at 2. The grievant's Request for Administrative Review does not appear to challenge the hearing officer's finding that the grievant violated this requirement – only that the failure to report did not rise to a Group III level. Request for Administrative Review at 8.

However, the grievant argues that the hearing officer erred in upholding discipline at the Group III level for this policy violation. In response, the agency points out that its general standards-of-conduct policy, Operation Procedure 135.1, identifies "[v]iolation of Operating Procedure 135.2" as a Group III offense.[22] While this provision of OP 135.1 is not dispositive here, DHRM Policy 1.60 does permit agencies to consider the impact of certain actions on their specific operations, which can result in a higher level of disciplinary action.[23] To the extent there is a conflict between the agency's policy and state policy, the appropriateness of Group III discipline (versus Group II) is ultimately determined by DHRM Policy 1.60, as explained above. Policy 1.60 allows agencies to issue discipline at the Group III level for "serious violations of policy" and "significant neglect of duty." Such discipline may be upheld by a hearing officer based on a preponderance of evidence in the record that the grievant's offense rose to this level in the context of agency operations.

Here, the hearing officer found that the "Inmate calling [the grievant's] phone number, offering her a second phone, and writing her a poem are all attempts of Inmate 'grooming' behaviors. . . . Inmate's actions were important to be reported to reduce his behavior in the future. This could have caused serious public safety issues should Inmate ha[ve] been able to convince a person to conduct what could have been a nefarious purpose."[24] There is evidence in the record that supports the hearing officer's findings as to the significance of the grievant's failure to report these behaviors. For example, the agency manager who issued the Written Notice in this matter, an assistant warden, testified that the grievant's failure to report the Inmate's offer of a cell phone presented a security risk because that type of interaction between inmates and employees is often associated with inmates attempting to procure prohibited items, including weapons.[25] The assistant warden also testified that most instances of inmates obtaining contraband are traced to a relationship with an employee.[26] The agency additionally introduced published guidance documents regarding inappropriate relationships between employees and inmates, characterizing such relationships as "dangerous for everyone."[27] 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.[28] Although the hearing decision could have included more analysis on this point, the hearing officer clearly concluded that the agency had met its burden to prove that the grievant's failure to report was serious enough to merit discipline at the Group III level. Because there is evidence in the record to support this conclusion, EDR declines to disturb the decision.

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[22] Agency Ex. 7, at 17-18; *see also* Agency Ex. 4.
[23] *See* DHRM Policy 1.60 Att. A ("Contingent with business needs and operational requirements, Agencies may determine that the impact of certain actions are more serious and issue a higher level of action than what is described" in the enumerated offenses of Attachment A.)
[24] Hearing Decision at 4.
[25] Hearing Recording 33:00-35:25 (assistant warden's testimony).
[26] *Id.* at 53:00-53:20.
[27] Agency Ex. 6.
[28] *See*, *e.g.*, EDR Ruling No. 2020-4976.

## CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision in this matter.[29] 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.[30] 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.[31] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[32]

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[29] To the extent the grievant's request for administrative review raises any arguments not explicitly address in this ruling, EDR has thoroughly reviewed the hearing record and concludes that no basis for remand is apparent.
[30] *Grievance Procedure Manual* § 7.2(d).
[31] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[32] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).