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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
Ruling Number 2025-5809  
February 14, 2025

The grievant (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 12085. For the reasons set forth below, EDR remands the hearing decision for reconsideration by the hearing officer.

**FACTS**

The relevant facts in Case Number 12085, as found by the hearing officer, are as follows:<sup>1</sup>

Grievant was a 23-year employee of the Agency. Grievant had an excellent record with the Agency receiving outstanding awards over the years. Grievant was positioned as Property Sergeant. Among Grievant’s duties were to do random shakedowns of inmates’ cells. During one such event, Grievant stated he found a gel pen which was forbidden for the inmates to have. Grievant confiscated the pen but chose to keep it for his personal use. There is no evidence other than Grievant’s statement that the pen belonged to an inmate prior to coming into Grievant’s possession.

Several weeks later Grievant was present at the front search desk. Grievant is seen on camera following protocol except Grievant did not empty his jacket pocket. While standing down for a pat down, a front desk officer went through the pockets of Grievant’s jacket and found a gel pen. As expected of her, she opened the pen. A white powdered substance spilled out of the pen. The front desk officer then left the area where the powder was spilled and asked another front desk person to come to where the substance was located. Grievant approached the area where his jacket and pen were located. The video shows Grievant approaching the area. The officer who opened the pen stated the powder that had spilled disappeared, but she did not know how. After watching the video, she then decided that Grievant must have moved it. It was then alleged Grievant then attempted to wipe this

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<sup>1</sup> Decision of Hearing Officer, Case No. 12085 (“Hearing Decision”), Dec. 12, 2024, at 3 (citations omitted).

substance away. The video does not clearly show such as Grievant's hand was behind an object blocking it from the video view. The front desk search person called for support. She gave the pen to Major H who was not the Evidence Officer.

. . . .

It was alleged Grievant was asked to stay at the search area. However, the witness said he asked Grievant to come see him when Grievant got in after the search and admitted it may not have been understood by Grievant that he was not to do anything else. Grievant stated no request was made to him to not move and Grievant proceeded to his work area. Grievant was called by his superior to come to the office and Grievant complied. Grievant took a drug test which was negative for any drugs in his system. . . .

The agency issued to the grievant a Group III Written Notice with removal on January 9, 2024.<sup>2</sup> The grievant timely grieved the disciplinary action, and a hearing was held on October 28, 2024.<sup>3</sup> In a decision dated December 12, 2024, the hearing officer determined that the Group III Written Notice must be upheld, with no mitigating circumstances to support a reduction of discipline.<sup>4</sup> 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.”<sup>5</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>6</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>7</sup> 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”<sup>8</sup> and to determine the grievance based “on the material issues and the grounds in the record for those findings.”<sup>9</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>10</sup> Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the

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<sup>2</sup> Hearing Decision at 1; Agency Exs. at 4-6.

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

<sup>4</sup> *Id.* at 5-6. While there was a lengthy time between the grievant’s termination and the hearing in this matter, the hearing officer described the procedural history and delays involved in the decision. *Id.* at 1.

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

<sup>6</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>7</sup> Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>8</sup> Va. Code § 2.2-3005.1(C).

<sup>9</sup> *Grievance Procedure Manual* § 5.9.

<sup>10</sup> *Rules for Conducting Grievance Hearings* § VI(B).

evidence that the action taken was both warranted and appropriate under all the facts and circumstances.<sup>11</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.

In his request for administrative review, the grievant challenges the hearing officer's finding that the grievant effectively possessed a controlled substance, which he then brought into the facility in violation of agency policy. Specifically, the grievant contends that no credible evidence proved that the pen possessed by the grievant contained a controlled substance. The grievant also argues that the hearing officer erred by sustaining discipline for the grievant's unknowing possession of a controlled substance. Finally, the grievant argues generally that the hearing officer failed to make findings on all of the material issues of the case.

### *Disciplinary Burden of Proof*

The written notice in this matter charged the grievant with being "in possession of buprenorphine, a controlled substance," which was "concealed within the inner walls of an ink pen" in the grievant's jacket as he came through front-entry search to his facility.<sup>12</sup> The written notice also noted that the grievant's behavior was "bizarre" in that he touched the powdery substance that fell out of the pen, suggesting that he knew the contents.<sup>13</sup> The agency charged that the grievant's possession of this substance violated its Operating Procedure 135.4, *Alcohol and Drug Testing*, and its provision that "[p]ossessing illegal drugs or controlled substances without a valid prescription is prohibited by state law."<sup>14</sup>

In her decision, the hearing officer found that a pen was in his possession when the grievant went through the front entry search.<sup>15</sup> Further, "a white powdered substance did fall out of the pen. The preponderance of evidence would be that the powder was a controlled substance."<sup>16</sup>

But the hearing officer additionally concluded that "[t]here was not sufficient evidence that Grievant knew he possessed drugs"<sup>17</sup>:

[E]vidence from other employees and [the grievant's] employment record would indicate . . . that Grievant did not possess or use non-prescribed drugs. There is also no evidence that would cause a connection with Grievant providing drugs to any inmate or other employees. . . . Nothing would lead one to believe Grievant was purposefully intending to smuggle contraband into the facility.<sup>18</sup>

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<sup>11</sup> *Grievance Procedure Manual* § 5.8.

<sup>12</sup> Agency Exs. at 4-5.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.*

<sup>15</sup> Hearing Decision at 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 4 (citations omitted).

Evidence in the record supports these conclusions.<sup>19</sup> In its response to the grievant's appeal, the agency maintains that the grievant had an "awareness of the substance's potential harm," referencing the grievant's post-incident statement that he thought the powder could be harmful.<sup>20</sup> But the hearing decision does not sustain this conclusion, and EDR's review of the record yields no evidence that would require the hearing officer to do so.<sup>21</sup> In any event, because the hearing officer's findings about the grievant's state of mind are not the subject of a timely appeal by either party, we consider those findings to be final for purposes of our review.

However, despite her finding that the evidence did not support intent by the grievant to "smuggle contraband into the facility," the hearing officer nevertheless found that termination was appropriate under the agency's policies:

The policies require that an employee not engage in forbidden behavior. Grievant possessed the pen. Grievant did not produce it at the front desk. The pen was examined by an employee and a powdered substance was found to be in the pen which was in Grievant's possession.<sup>22</sup>

Upon a thorough review of the record, EDR cannot find that this analysis complies with the *Rules for Conducting Grievance Hearings*. In grievances involving formal discipline, a hearing officer must assess whether the grievant engaged in the behavior described in the Written Notice; whether such behavior constituted misconduct; and whether the resulting discipline was consistent with law and policy.<sup>23</sup> Here, the hearing decision contains only limited factual findings as to whether the grievant engaged in the conduct charged. More importantly, even accepting those factual determinations as sufficient, EDR cannot identify a basis in agency policy for finding that the grievant engaged in misconduct.

#### Findings as to the "Controlled Substance"

As an initial matter, it is not clear that the hearing decision contains sufficient findings as to the nature of the "white powdered substance" that fell out of the pen the grievant carried through front search on the date in question. Among the specific issues the hearing decision explicitly identified for resolution were "[w]hether testing of the substance at issue in the matter was proper[ly] tested" and "[w]hether the method of testing the substance would alter the outcome of the matter."<sup>24</sup> The record as a whole reflected uncertainty around accurate identification of the substance, which the agency has characterized by different names in its filings.<sup>25</sup> As the grievant

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<sup>19</sup> See, e.g., Hearing Recording at 1:36:30-1:36:40 (Major's testimony); *id.* at 3:11:05-3:12:30, 3:22:00-3:25:50, 3:29:20-3:31:10, 3:32:05-3:33:20 (grievant's testimony); 4:25:30-4:27:35, 4:29:20-4:30:50 (property officer's testimony); *see id.* at 4:05:30-4:08:20 (warden's testimony).

<sup>20</sup> Agency's Response to Grievant's Request for Administrative Review at 6.

<sup>21</sup> The Written Notice essentially charges that, by touching the powder, the grievant showed he knew it was *not* a type of substance that would be harmful to touch. Agency Exs. at 4-5.

<sup>22</sup> Hearing Decision at 5.

<sup>23</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>24</sup> Hearing Decision at 2.

<sup>25</sup> The Written Notice charged the grievant with possession of buprenorphine, as reflected by a test conducted by the Department of Forensic Science. Agency Exs. at 4, 8. The agency's response to the grievant's appeal characterizes the substance as "Suboxen." Agency Response to Grievant's Request for Administrative Review at 5. The forensic scientist who performed the analysis testified that buprenorphine is an ingredient in suboxone, but they are considered different substances. Hearing Recording at 4:15:55-4:16:30.

notes in his appeal, he presented substantial evidence calling into question whether the substance ultimately lab-tested was the same substance in the pen he was carrying on the date in question.<sup>26</sup>

Based on these arguments, the grievant contends on appeal that the hearing officer erred in even admitting the agency's evidence as to the nature of the substance in the pen. We disagree; the hearing officer properly admitted this evidence as relevant to a material issue, for purposes of assessing the weight it was due in her consideration of the issue.<sup>27</sup>

But while the hearing decision acknowledged that the nature of the substance in the pen was a material issue to the case, it addresses the issue with only a conclusory statement that "the powder was a controlled substance."<sup>28</sup> The grounds in the record or underlying reasoning for this finding is not contained in the decision. There is no finding as to the specific nature of the controlled substance or discussion as to the significance (or lack thereof) of substantial alleged gaps in the chain-of-custody evidence, despite the decision's identification of this issue as one requiring explicit findings.<sup>29</sup> As a result, if this issue were determinative to our review, it is questionable whether EDR could uphold the decision as written.

That said, EDR concludes that this issue is *not* determinative, for the reasons discussed below.

#### Definition of the Offense

Even assuming that a preponderance of the evidence demonstrated that the grievant's pen contained a controlled substance for which he did not have a prescription,<sup>30</sup> the hearing decision does not articulate a reasonable basis in the record for a finding of misconduct within the scope of the Written Notice. The decision essentially states that, regardless of the grievant's intent, the relevant agency policies prohibited his "possession" of the pen. In support, the decision cites to the agency's Operating Procedure 135.4, § III(B), located under the section heading "Prohibited Conduct and Consequences," which provides:

Employees, volunteers, interns, and contractors must not possess alcohol, marijuana, marijuana products, cannabis oil or cannabis products, including in their

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<sup>26</sup> Request for Administrative Review at 6-10. For example, the record contains two chain-of-custody forms associated with the pen at issue, neither of which appear to reflect standard evidence handling under agency policy. *See* Grievant's Exs. at 86, 140, 156. In addition, witnesses testified that individuals not identified in chain-of-custody documentation also had custody of the pen prior to forensic testing. Hearing Recording at 1:31:35-1:32:20 (Major's testimony); 2:34:30-2:39:15 (investigative staff testimony).

<sup>27</sup> *See Rules for Conducting Grievance Hearings* § IV(D) (In grievance hearings, "the technical rules of evidence do not apply and most probative evidence (any evidence that tends to prove that a material fact is true or not true) is admitted.").

<sup>28</sup> Hearing Decision at 4.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> Multiple agency witnesses testified as to how they handled the pen and sent it for lab testing, which ultimately returned an identification of the substance as buprenorphine, a controlled substance. Agency Exs. 4-5; *see* Hearing Recording at 33:40-39:30 (discovering officer's testimony); 1:02:20-1:07:00 (Major's testimony); 1:46:20-1:48:20 (evidence manager's testimony); 2:34:30-2:39:15 (investigative staff testimony). There is no evidence that the grievant had a prescription for buprenorphine. Based on this evidence, the hearing officer could have accepted the test as accurate, rejecting the grievant's theory that the pen and residue within it were compromised in some way prior to testing.

vehicles while on the grounds of any [agency] Organizational Unit . . . . Violations will result in the employee removal from duty and disciplinary action . . . .<sup>31</sup>

This provision appears to be cited in error in this case. By its terms, the provision relates specifically to alcohol and marijuana products. Nothing in the record suggests that those substances are at issue here.

Section III(A)(1) of the same policy, cited in the agency's Written Notice, provides:

Manufacturing, distributing, possessing, or using unlawful drugs, illegal drugs, or controlled substances without a valid prescription is prohibited by state law.<sup>32</sup>

Consistent with this provision, the Written Notice in this case clearly indicates the agency's view that the grievant *did* know the contents of the powder that fell out of the pen he carried through front search – *i.e.*, a controlled substance for which he did not have a prescription.<sup>33</sup> Particularly in light of her findings to the contrary, EDR cannot conclude that the hearing officer's ultimate conclusion is supported by this policy provision alone. Without findings about the nature of the substance and, more crucially, which state law(s) would be implicated by the grievant's apparently (based on the hearing officer's findings) unintentional possession of it, the hearing decision does not contain a sufficient basis to uphold misconduct under § III(A)(1). The agency has not suggested any laws that would prohibit unintentional possession under the circumstances.

In its response to the grievant's appeal, the agency confirms that its policy is intended to prohibit "possession" of controlled substances via a "strict liability" theory. More specifically, the agency argues:

The Grievant's long tenure and position as Property Sergeant would have made him well aware of the Agency's policies and procedures, including those related to contraband. His possession of the pen, regardless of his knowledge of its contents, is a violation of these policies.<sup>34</sup>

We question whether mere possession – without evidence of knowledge or, at a minimum, negligence – can or should constitute an "offense" under DHRM Policy 1.60, *Standards of Conduct*. However, we need not reach such a question. Although the agency describes its policy as one of "strict liability," we do not find language in the agency's policy supporting such a construction. Rather, the agency's policy states that "possessing" a controlled substance is prohibited by state law. As already stated, no such state law was proffered, but EDR would make reference here to Virginia Code Section 18.2-250, which makes it "unlawful for any person **knowingly or intentionally** to possess a controlled substance...."<sup>35</sup> As such, we cannot interpret the language of the agency's policy, which appears premised upon violations of state law, without taking into consideration this provision. As no other provision of law has been presented as relevant by the parties at hearing or during this appeal, we are unable to reach the conclusion that unknowing or unintentional possession is prohibited by the agency policy. The agency's

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<sup>31</sup> Agency Exs. at 204.

<sup>32</sup> *Id.* at 203.

<sup>33</sup> *Id.* at 1-2.

<sup>34</sup> Agency Response to Grievant's Request for Administrative Review at 5.

<sup>35</sup> Va. Code § 18.2-250 (emphasis added).

submission provides no insight as to what policy standard the grievant might have violated by his unintentional possession – other than its Operating Procedure 135.4, § III(A)(1), as cited in the Written Notice. As explained above, EDR cannot find that the hearing officer’s findings support discipline under that provision.

In sum, the hearing officer essentially found that the grievant brought through front search a pen that, unbeknownst to him, contained a prohibited substance. Neither the hearing decision nor the agency has offered any policy standard that could be reasonably applied to characterize this conduct, without more, as terminable misconduct. Because there is no apparent avenue for the agency to carry its burden of proof as to the discipline issued, this matter must be remanded for rescission of the Group III Written Notice and award of associated pay and benefits.<sup>36</sup>

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer with instructions to issue a reconsideration decision rescinding the agency’s disciplinary actions in this matter. Both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any new matter addressed in the remand decision (*i.e.*, any matters not resolved by the original decision or first reconsideration decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.<sup>37</sup> 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>38</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>39</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>40</sup>

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<sup>36</sup> The grievant’s final argument on appeal is that the hearing officer failed to address several of the enumerated issues identified in his grievance. We conclude that, as to any issues for which the hearing decision may contain insufficient findings for review purposes, this argument is effectively moot on remand, as the grievant is due full relief pursuant to this ruling.

<sup>37</sup> See *Grievance Procedure Manual* § 7.2.

<sup>38</sup> *Id.* § 7.2(d).

<sup>39</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>40</sup> *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).