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THIRD ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5823
February 20, 2025

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 reconsideration decision issued on January 14, 2025, in Case Number 12082. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS AND PROCEDURAL HISTORY

The relevant facts in Case Number 12082, as found by the hearing officer, are reflected in EDR's first administrative review in this case and are incorporated here by reference.[1] The matter still at issue in this case is a Group II Written Notice issued for contacting a probationer through social media (fraternization).[2] In the original hearing decision, the hearing officer upheld the Group II as issued.[3] In the first administrative review, EDR remanded the matter for the hearing officer to clarify her findings, the standard applied to reach them, and the evidentiary basis for her determinations as to upholding the Group II.[4] On remand, the hearing officer provided further discussion and determinations about the Group II, deciding to uphold the disciplinary action again.[5] Upon consideration of the grievant's appeal of the hearing officer's Reconsideration Decision, EDR issued a second administrative review that again remanded the matter to the hearing officer to primarily require that the hearing officer consider and apply the correctly applicable agency policy.[6] On January 14, 2025, the hearing officer issued a Second Reconsideration that again upheld the Group II Written Notice based on the following discussion:

> The Agency could not definitely prove Grievant knew the zlogger was an inmate, probationer, or parolee. However, the Agency believed by a ponderance of

[1] EDR Ruling No. 2025-5737; *see also* Decision of Hearing Officer, Case No. 12082 ("Hearing Decision"), July 3, 2024, at 3.
[2] Agency Ex. 2.
[3] Hearing Decision at 6.
[4] EDR Ruling No. 2025-5737 at 3-4.
[5] Reconsideration Decision of Hearing Officer, Case No. 12082 ("Reconsideration Decision"), Nov. 7, 2024.
[6] EDR Ruling No. 2025-5791.

> the evidence, that Grievant knew or should have known the zlogger's status. She clearly knew he was a felon and the length of time from his pardoned release should have at least been a question in Grievant's mind before she proceeded to engage in a social media association. Grievant never reported to her superior that she had engaged in conversation, that is, fraternization on social media with a released felon.[7]

The grievant now appeals the Second Reconsideration 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."[8] 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.[9] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In EDR's second administrative review, we remanded the matter "for the hearing officer to clarify her findings, the standard applied to reach them, and the evidentiary basis for her determinations as to the Group II Written Notice for fraternization."[11] Based on our review of the hearing officer's Second Reconsideration, we cannot say that the hearing officer has provided a clear description of her analysis, consideration of the evidence, and application of the relevant policy. However, given that this is EDR's third administrative review in this case, we acknowledge that the hearing officer has satisfied minimally the requirements under the grievance procedure and *Rules for Conducting Grievance Hearings* to address the matters at issue. Accordingly, we will now address the two bases for the grievant's appeal.

First, the grievant argues that the hearing officer essentially had no factual basis to determine what the grievant knew or should have known about the probationer's status. 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

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[7] Reconsideration Decision of Hearing Officer, Case No. 12082, Jan. 14, 2025 ("Second Reconsideration"), at 1 (footnote omitted). EDR has not addressed the hearing officer's use of the term "zlogger" in the issued hearing decisions. It is not clear where this term came from in the record, but it does not appear to be a correct term to refer to someone who posts videos on the internet.
[8] Va. Code §§ 2.2-1202.1(2), (3), (5).
[9] *See Grievance Procedure Manual* § 6.4(3).
[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).
[11] EDR Ruling No. 2025-5791, at 3.
[12] Va. Code § 2.2-3005.1(C).
[13] *Grievance Procedure Manual* § 5.9.

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] 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 the first administrative review ruling, EDR stated that "it is a reasonable interpretation of the [agency's] policy that an employee cannot be viewed as violating the policy unless they knew or should have known of the individual's status."[16] While the hearing officer's analysis is fairly cursory, it is reasonable to conclude that the factors cited in the Second Reconsideration are those one would consider to find that the grievant *should have known* the status of the probationer.[17] The hearing officer has cited to the evidence in the record relied upon[18] and her interpretations thereof. Because such factual determinations are within the hearing officer's discretion and there is record evidence to support them, EDR will not disturb the finding.

The grievant also asserts that her conduct of asking a question over social media to the probationer did not rise to the level of fraternization under the agency's policy. The relevant agency policy (Operating Procedure 135.2)[19] prohibits fraternization between employees and probationers/parolees.[20] The policy defines fraternization, in relevant part, as "[e]mployee association with inmates/probationers/parolees … outside of employee job functions, that extends to unacceptable, unprofessional and prohibited behavior."[21] Examples of fraternization include "connections on social media."[22]

In the Second Reconsideration decision the hearing officer includes this relevant policy definition and appears to find that the grievant's conduct amounted to fraternization because it was a "social media association."[23] Based on our review of the hearing officer's findings and the relevant policy language, we find that the ultimate decision reached is not inconsistent with the agency's policy. EDR would readily acknowledge that the agency's case, the record evidence in support, and descriptions of its policy application in the record are weak. Looking only at the grievant's conduct of asking a question of someone on social media, it would be difficult to fairly consider the conduct as a "connection on social media." However, as found by the hearing officer, the grievant's conduct led the probationer to create a subsequent video identifying the grievant and

[14] *Rules for Conducting Grievance Hearings* § VI(B).
[15] *Grievance Procedure Manual* § 5.8.
[16] EDR Ruling No. 2025-5737, at 3.
[17] Second Reconsideration at 1. The hearing officer found that the probationer's status "should have at least been a question in Grievant's mind before she proceeded to engage in a social media association." *Id.*
[18] *See, e.g.*, Agency Ex. 11; *see also* Hearing Decision at 1.
[19] Agency Ex. 30.
[20] *Id.* (Agency Exs. at 131).
[21] *Id.* (Agency Exs. at 127).
[22] *Id.*
[23] Second Reconsideration at 1. Although the term "social media association" does not appear in the agency policy, it appears the hearing officer uses this term to mean a fraternizing "association" involving a connection on "social media" under the policy.

her question as the impetus.[24] As such, it is reasonable for an outside observer to view that situation as the grievant having a "connection" with this probationer on social media. While this perception would arguably be driven by the probationer's conduct, the grievant's initial question ran a foreseeable risk of such a thing happening, and the agency is not unreasonable to consider those factors in its application of policy and disciplinary decision. As such, although we might have reached a different conclusion about this behavior, we cannot find that the agency's choice of disciplinary action here was inconsistent with state or agency policy.

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.[25] 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.[26] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[27]

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Director
Office of Employment Dispute Resolution

[24] Hearing Decision at 4; Second Reconsideration at 1.
[25] *Grievance Procedure Manual* § 7.2(d).
[26] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[27] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).