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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5831
March 13, 2025

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 12149. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 12149, as found by the hearing officer, are as follows:¹

Prior to his dismissal, Grievant was a Senior Corrections Officer at the Facility. Grievant had been employed at the Facility for over a year. No evidence of prior disciplinary action was introduced during the hearing.

The Facility is one of four Agency facilities that houses an inmate population of women.

Facility staff, including Grievant, received training on Agency policies prohibiting harassment and inappropriate behaviors both among staff and among staff and inmates. Such policies and prohibited behaviors were discussed regularly with the corrections officers during meetings and pre-shift briefings. The Warden testified that because of the inmate population the Facility serves, the Facility staff also were trained to be trauma aware and gender responsive so that they would be cognizant of, and empathetic to, the potential trauma experienced by many of the inmates in their care.

On April 9, 2024, Grievant was on duty working in the Control Room of a Unit in the Facility. The Unit Control Room is a secured area of the Facility that is not accessible to inmates housed at the Facility. There is an Equipment Closet

¹ Decision of Hearing Officer, Case No. 12149 ("Hearing Decision"), Jan. 22, 2025, at 3-6 (footnotes omitted).

inside the Unit Control Room. The Equipment Closet includes various keys and equipment, including restraints.

At approximately 7:25 a.m., Grievant was working alone in the Unit Control Room when Officer 1 entered the Unit Control Room to retrieve items from the Equipment Closet. While Officer 1 was inside the Equipment Closet, Grievant stood in the doorway of the Equipment Closet and made a comment to Officer 1. Although Officer 1 and Grievant have differing accounts of the exact words Grievant used, all accounts include Grievant referring to a “rape” that “could” happen in the Equipment Closet because “there are no cameras” in the Equipment Closet. After Grievant first made the comment, Officer 1 asked Grievant what he said, and Grievant repeated the statement.

Officer 1 testified that Grievant’s statement made her concerned about the absence of cameras in the Equipment Closet and nervous for her own safety. Because Grievant was standing in the doorway, Officer 1 described “squeezing” herself by Grievant to exit the Equipment Closet. Officer 1 then exited the Unit Control Room.

Officer 1 testified that after she exited the Unit Control Room, she was instructed to complete her security rounds which were due at that time. After completing her security rounds, Officer 1 reported the incident to her supervisor, a Sergeant.

After she first verbally reported the incident, Officer 1 wrote a statement of the incident which she signed and dated at 7:52 a.m. on April 9, 2024, and provided to the Human Resource Officer that morning. Officer 1 wrote the following:

0725 – When I, [Officer 1] stepped into [the Unit Control Room] to grab the [keys] to open the storage closet in [the Unit], [Grievant] followed me into the [Equipment Closet] and made the comment of “There are no cameras in here you know that right? Like I could rape you” and then repeated the statement of “I could rape you.”

Later that same morning, at approximately 8:23 a.m., Officer 1 submitted an Internal Incident Report regarding her interaction with Grievant. Officer 1 described the incident as occurring on April 9, 2024, at 7:25 a.m. and described the incident as follows:

On Tuesday, April 9th 2024, I, [Officer 1] entered [the Unit Control Room] at approximately 7:24 am to grab the [Unit keys] to open a storage closet in [the Unit], at which point I was approached by [Grievant] at the door of the [Equipment Closet] inside [the Unit Control Room]. At approximately 7:25 am [Grievant] stood directly in front of the door leading back into [the Control Room] blocking my path out of the door. At which point he, [Grievant] made the comment “There are no cameras in here, you know that right? Like I could rape you right now.” I, [Officer 1], then made the statement

“What?” to which [Grievant] repeated the statement “I could rape you.” At that point I, [Officer 1] exited [the Control Room] and made rounds in [two parts of the Unit] as is required being the floor officer. After completion of my round [in part of the Unit] I, [Officer 1], informed [Sergeant], who is the [Building] Sergeant and my supervisor at the time and [Sergeant] instructed me to call watch command. I reported to the watch office and notified [Captain], who informed the Major. For this reason, this report is written.

The Warden met with Grievant at approximately 9:50 a.m. that same morning regarding Officer 1’s report of her interaction with Grievant in the Unit Control Room that morning. Grievant provided a hand-written statement to the Warden regarding the incident, Grievant wrote:

On 9th of April 2024, I, [Grievant] was called to report to the Warden conference room and [Warden], [Major] asked me about what happened in the [Unit Control Room] with [Officer 1]. I stated that [Officer 1] came in [the Unit Control Room] to look for a set of keys in the [Equipment Closet] in [the Unit Control Room], and I talked to her that there is no camera in that small room and said “Do you know if there can be a rape in that small room because there is no camera.” I was surprised to hear that she reported that I talked straight to her that I tried to rape her. That is a misunderstanding I’m disappointed, I’m [shocked], she knows well that I can’t do that or speak that intentionally she knows well that I respect her, and others as well; she knows well that was a joke. Please, believe me, I’m not that kind of person, I know how bad is that word or that act, I respect my wife and my family that can never happen to me even in my dreams. That is totally a misunderstanding.

On April 12, 2024, Grievant submitted a typed statement regarding the incident with Officer 1, that stated:

Note explaining the incident at the workplace on April 9th, 2024

Before I get into details of what happened on April 9th, please allow me to first express my sincere apology to everyone, and particularly to my colleague [Officer 1] whom I unintentionally offended.

I have worked with [Officer 1] and spent so many hours together on the road transporting inmates, at the hospital, and at the facility. Not at any given time [Officer 1] would say that I ever said or done anything that made her uncomfortable. Same is true with all my colleagues, males, or females, they would attest that I have conducted myself with upmost respect and professionalism.

Regarding what happened on April 9th, it is very unfortunate that I made a statement that came across terribly different than my actual intention.

The reference to “a rape could happen in there as there are no cameras” intended to express the fact that security needs to be improved for that control room including installing security cameras.

There has been a misunderstanding from what officer heard and what I really meant to say.

This comment came across poorly due to my level of English when I am thinking in a different language but speaking in another. I realize that languages do not translate 100% to each other.

I am a man of faith to God, I am husband and father of four children, I love my family and I would never ever dishonor God, my family, and myself with such a despicable behavior.

During the first meeting I was in a huge shock, shaking, and did not really think straight with my answers. Again, due to my deficiency expressing myself I said that “was a joke” but I should have said that we were having a simple conversation about the need for more security measures.

I have always considered and treated [Officer 1] professionally, even on that day, after the comment I asked her for a favor to help taking my trash out as we always do when one of us is exiting the control room and she did help me.

In conclusion, I came before you to please consider the fact that there has been miscommunication and a misunderstanding between me and [Officer 1]. All the time I have worked with her or/and other colleague I never said or did anything to cause harm but conducted myself professionally. As I said, I realize that conversation among different cultures and different languages can lead to big misunderstandings. I would like to make sure you have my promise that this kind of miscommunications will not happen.

The Department of Corrections (“the agency”) issued to the grievant a Group III Written Notice with termination.² The grievant timely grieved the disciplinary action, and a hearing was held on November 19, 2024.³ In a decision dated January 22, 2025, the hearing officer determined that the agency presented sufficient evidence to support the agency’s disciplinary action.⁴ The

² Hearing Decision at 1; Agency Exs. at 1-3.

³ See Hearing Decision at 1.

⁴ *Id.* at 7-9.

hearing officer further found no mitigating circumstances to rescind the Written Notice.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 the grievant’s appeal, he states that he “request[s] or ask[s] only one thing please . . . I believe I deserve another chance in another facility.”⁹ EDR interprets this request as addressing the agency’s apparent determination that the grievant is ineligible for rehire. Pursuant to DHRM Policy 1.70:

Agencies may determine if an employee is eligible for rehire to their agency based upon documented factual criteria that is applied consistently for similar situations. Rehire eligibility is applicable only to the separating agency.¹⁰

As reflected in the agency’s policy, “[e]mployees who are terminated, resign in lieu of termination, resign while disciplinary action is pending, or resign while an investigation is being conducted will not be eligible for re-employment with the DOC.”¹¹ Thus, the grievant’s ineligibility for rehire is consistent with the agency’s policy.¹² It is unclear whether the agency’s policy of rendering all such individuals covered by this provision as ineligible for rehire is consistent with the state policy

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 The grievant also appears to include a discussion of not having a requested interpreter at the hearing. The hearing officer addressed this issue in the decision, noting the parties’ agreement to the grievant’s ability to request assistance during the hearing and for the hearing to proceed without the interpreter. See Hearing Decision at 2. Accordingly, EDR can find no error with the hearing officer’s approach to this situation. In addition, the grievant makes reference in his appeal to a writing he gave to his advocate that was not apparently accepted by the hearing officer. The grievant has not indicated what this document was or what information it may have contained. As such, we are unable to find that the grievant demonstrated any basis for remand with regard to any such document. EDR would note that a discussion occurred at the beginning of the hearing about a document that seemed to reflect the grievant’s notes about what he wished to address in the hearing. The hearing officer stated that there was a deadline by which to exchange exhibits and we presume this record had not been shared before that deadline, which is reflected as the basis for the hearing officer’s refusal of an exhibit. Further, it appears that the grievant accepted that his notes could be read into the record as he presented his case. Hearing Recording at 3:37-6:30. Thus, it does not appear that the hearing officer was in error with her approach to this issue.

¹⁰ DHRM Policy 1.70, *Separation from State Service*, at 5.

¹¹ DOC Op. Proc. 175.1, *Employee Separations* § I(B)(2). While this policy is not included in the hearing record, it is publicly available on the agency website at: <https://vadoc.virginia.gov/files/operating-procedures/100/vadoc-op-175-1.pdf>.

¹² This determination does not prohibit hiring with other state agencies.

language that would appear to suggest the consideration of “documented factual criteria.” However, EDR cannot find that the agency would be unreasonable in this situation to have determined the grievant to be ineligible for rehire under the facts of this case. It is additionally unclear whether the grievant’s request to be eligible for rehire was addressed to the hearing officer for consideration. However, we presume that it was not as there is nothing in the hearing decision reflecting such an issue being raised and the grievant has not pointed EDR to evidence not considered by the hearing officer.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹³ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁴ 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.¹⁵ 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.¹⁶ 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. The grievant has not asserted any contention with regard to the hearing officer’s findings, and thus has not presented any basis in his appeal on which EDR could find that remand is warranted.

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.¹⁷ 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.¹⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁹

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¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

¹⁷ *Grievance Procedure Manual* § 7.2(d).

¹⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

¹⁹ *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).