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SECOND ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2024-5732
August 14, 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 remand decision in Case Number 12006. For the reasons set forth below, EDR remands the matter for further consideration by the hearing officer consistent with this ruling.

PROCEDURAL HISTORY

The relevant facts in Case Number 12006, as found by the hearing officer in a remand decision, are hereby incorporated by reference.¹ On remand, the hearing officer received additional arguments and exhibits from both the grievant and the Department of Juvenile Justice (the “agency”) and held a supplemental hearing on May 6, 2024.² In the resulting remand decision, the hearing officer made factual findings and determinations to address questions EDR had required to be considered in the first administrative review in this case, EDR Ruling Number 2024-5648 (“prior ruling”). The hearing officer determined most of these questions in favor of the grievant, finding that the agency had failed to meet its burden of proof.³ However, the hearing officer then determined that the grievant’s instructional guidance for a juvenile to be released from custody was contrary to Virginia Code § 16.1-247(D)⁴ because the juvenile’s release was not conditioned upon the provision of a warrant on bail or recognizance.⁵ Thus, the hearing officer reversed her previous finding from the original decision that rescinded a Group II Written Notice and instead upheld the Written Notice as issued.⁶ The grievant now appeals the decision to EDR.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

¹ Remand Decision of Hearing Officer, Case No. 12006 (“Remand Decision”), June 14, 2024, at 2-9.

² *Id.* at 1.

³ *Id.* at 10-13.

⁴ Although at certain times the remand decision refers to the section as “16.1-147,” it is apparent that is simply a typographical error and the actual Virginia Code section referenced is § 16.1-247.

⁵ Remand Decision at 13-15.

⁶ *Id.* at 16.

... procedural compliance with the grievance procedure ...”⁷ 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Before addressing the grievant’s request for review, EDR would note that in the prior ruling we were “unable to fully address the agency’s objections due to certain questions not resolved by the hearing decision.”¹⁰ Although these questions were addressed on remand, most were not in favor of the agency. However, the agency has not appealed the remand decision. Therefore, to the extent there were outstanding questions left from the agency’s request for administrative review that led to the prior ruling, we will not be addressing those further in this ruling because the agency submitted no appeal. This ruling will only address the grievant’s request for administrative review of the remand decision.

Grievant’s Authorization of Juvenile’s Release

The hearing officer found that the grievant’s instruction violated Va. Code § 16.1-247(D) by releasing the juvenile without provision for bail or recognizance. However, citation to this section (or its provision for bail or recognizance) was not made by the agency at hearing or, importantly, in the Written Notice as the basis for the grievant’s discipline. Therefore, it cannot reasonably be concluded that the agency decided to issue the grievant this Written Notice because she directed the release of the juvenile without provision for bail or recognizance. Further, both the agency and grievant assert that this provision does not apply to the grievant in this situation.¹¹ Indeed, the grievant states that there is “no law or policy that gives the Grievant authority to ensure provision of bail or bond.” Thus, EDR would concur with the parties that it does not appear that this provision properly resolves this matter. Accordingly, EDR is remanding the matter to the hearing officer to reassess the basis on which the grievant’s instruction for the release of the juvenile could be deemed improper by the agency.

EDR understands and appreciates the hearing officer’s attempts to find an answer to the questions posed by this case in statute. Such answers should not be for the hearing officer to search for, as the parties should present evidence about those answers and, therefore, all the hearing officer need do is refer to record evidence. Unfortunately, the parties’ presentations have left questions unanswered, at least based on EDR’s review. For example, the agency has maintained a steadfast position that the grievant simply gave an instruction to violate a court order. By its terms, the court’s order required the juvenile to be delivered to a particular locality’s detention center.¹²

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); see *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ EDR Ruling No. 2024-5648 at 5.

¹¹ Based on our review of this Code provision, EDR does not necessarily agree with the parties that this particular section does not apply. We understand how the hearing officer reached this conclusion as the provision would appear to apply to situations when a juvenile is taken into custody under a detention order when the court is closed. However, given that it is difficult to read noncompliance with this particular legal provision to be a part of the Written Notice as issued, we need not examine this question further.

¹² Agency Ex. 8.

However, the particular locality's detention center would not accept the juvenile.¹³ As no other alternatives were prescribed on the order, if we are to accept the agency's position that to do anything else other than what is listed on the order is a violation of that order, any action to try to address the situation with the juvenile would have "violated" the order. For example, the agency has suggested that Va. Code § 16.1-249(G1) would apply to rebut the grievant's argument that no placement options were available. This Code provision states that a juvenile can be held "in a nonsecure area, provided that constant supervision is provided." Even if we are to assume that this Code provision applies, had the grievant directed the juvenile's detention in such a manner she would have violated the court order under the agency's analysis. No provision of the order provided for detention in a nonsecure area.

EDR has attempted to review the relevant statutes to determine if there are any provisions that would clearly articulate the proper outcome of this case. EDR's analysis of the relevant statutes is that they are somewhat confusing and, at times, overlapping. The agency appears to argue that Va. Code § 16.1-249 applies. However, it is not clear that is the correct analysis because this section applies to juveniles who have been determined to "remain in custody,"¹⁴ which presumably means a period of extended detainment not at issue in this case.¹⁵ Certain provisions of Va. Code §§ 16.1-247 and 16.1-248.1 would appear applicable as the basis for which the detention order was entered in the first place.¹⁶ EDR would commend the parties' attention to Va. Code § 16.1-248.1(B), which states that "[a]ny juvenile not meeting the criteria for placement in a secure facility shall be released to a parent, guardian or other person willing and able to provide supervision and care under such conditions as the judge, intake officer or magistrate may impose." EDR would acknowledge at the outset that the applicability of this provision is not clear. The "criteria for placement in a secure facility" described in this section had been met as indicated in the detention order. However, given the juvenile's medical status and unavailability of placement options, it is at least a valid question to determine whether the juvenile still met the "criteria for placement in a secure facility" when they were detained. This section is of further note both because it contemplates release of a juvenile to a parent (the action that occurred in this case) and contemplates the act of release to be imposed with conditions by a "judge, *intake officer* or magistrate." Thus, it would appear that an agency employee, as the applicable intake officer, could be involved in such a release of a juvenile – though not necessarily in the context at issue in this case.

Nevertheless, in the prior ruling, EDR directed that on remand "the hearing officer must address the authority or approval the grievant was acting under to direct that the juvenile be released."¹⁷ EDR further observed that "it would be the grievant's burden to demonstrate that her actions were appropriately within her authority."¹⁸ EDR also noted in the prior ruling that the grievant did not rely on any provision of code or policy in her instruction.¹⁹ At this time, EDR would note that there have been now two hearings in this case with extensive arguments by both parties without a clear answer to the question of whether any legal authority authorized the

¹³ Remand Decision at 3.

¹⁴ Va. Code § 16.1-249(A).

¹⁵ For example, the provision cited by the agency, Va. Code § 16.1-249(G1), would appear to apply when a juvenile is in custody and is moved to a courthouse "incident to a court hearing" awaiting their case to be called.

¹⁶ Agency Ex. 8.

¹⁷ EDR Ruling No. 2024-5648 at 9.

¹⁸ *Id.*

¹⁹ *Id.* (citing Hearing Recording Pt. 1.5).

grievant's instruction as proper. Therefore, on remand the hearing officer must assess whether the agency has met its burden of proof to establish that the grievant's instruction was improper. If so, has the grievant met her burden to present a basis for the authority to do so, as an affirmative defense? Depending on the hearing officer's determination of these issues, the hearing officer must consider whether the grievant engaged in misconduct and at what level of discipline under the Standards of Conduct based on the record evidence.

Mitigation

The grievant has also questioned the hearing officer's mitigation analysis, noting the differences between the hearing officer's original decision, which stated that the Group II Written Notice exceeded the limits of reasonableness,²⁰ and the remand decision, which found the disciplinary action reasonable and not subject to mitigation.²¹ While we understand the grievant's points, the fact that the remand decision is based on a violation of law not considered in the original decision, the resulting mitigation analysis is not unreasonable. However, because the matter is being remanded due to the reliance on a legal provision with unclear application to this case, EDR need not address the mitigation analysis with finality. On remand, to the extent necessary, the hearing officer may reassess her mitigation determinations depending on whether or how the analysis of this case may change.

CONCLUSION AND APPEAL RIGHTS

For the foregoing reasons, EDR finds that the remand decision must be reconsidered by the hearing officer as described above. Both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any *new matter* addressed in the second reconsideration decision (i.e., any matters not previously part of the original or remand decisions).²² Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.²³

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, the hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the hearing officer has issued their remanded decision.²⁴ 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.²⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁶

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²⁰ Decision of Hearing Officer, Case No. 12006, Nov. 21, 2023, at 13.

²¹ Remand Decision at 15-16.

²² See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

²³ See *Grievance Procedure Manual* § 7.2.

²⁴ *Id.* § 7.2(d).

²⁵ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁶ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).