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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5737
August 5, 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 decision in Case Number 12082. For the reasons set forth below, EDR remands the matter to the hearing officer for further clarification.

FACTS

The relevant facts in Case Number 12082, as found by the hearing officer, are as follows:[1]

> On June 14, 2023, Grievant entered the facility for her workday. As she went through front desk search, a cell phone cord was found in her coat pocket. The cord was described as extra-long and not one that would fit Grievant's brand of cell phone. This was reported by the front desk person to her superior about a week after the cord was found.
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> A former felon has a presence on social media talking about his experiences while incarcerated and makes comments and suggestions about prison life. He has a fairly large following. On August 26, 2023, Grievant sent a text to one of his segments asking if he was familiar with the facility where she is employed. By response, the author of the zlog did a segment of his opinion about that facility. Grievant did not make any further known comment. In several of the felon's skits he states that he was pardoned by the Governor but is still on probation. (A pardon releases from jail but does not change the person's status.) The segment to which Grievant made response did not state that the felon was on probation. Grievant did not report her interaction with the felon through this social media to her superior at work.

[1] Decision of Hearing Officer, Case No. 12082 ("Hearing Decision"), July 3, 2024, at 3 (footnotes omitted).

> In November of 2023, a cell block search was done in the pod where Grievant worked. Two cell phones were found. All 170 Inmates were questioned regarding the ownership of the phones. Various people did the questioning. A Special Investigator questioned four (4) Inmates that he relied on as "snitches". While there was no revealing information from 166 Inmates, these four all said they heard or believed the person supplying the phones was Grievant. All four of these Inmates were granted a move to another prison.
>
> On November 15, 2023, shortly after the cell block search, a search with a dog was done on employees and their vehicles as they entered the facility grounds for their workday. For an unspecified reason, the dog singled out the Grievant's vehicle. The entire car was searched and Grievant and her partner, the driver, were taken into the facility and strip searched. The thorough search revealed nothing.
>
> Grievant was then charged with three (3) Written Notices. The first for her message on social media to the felon zlogger. The second one is for bringing cell phones and a contraband cell phone cord in the facility. The third for not reporting an Inmate making forbidden gestures to Grievant. The Agency dropped the third charge.

On December 29, 2023, the agency issued to the grievant: 1) a Group II Written Notice for contacting a probationer through social media, and 2) a Group III Written Notice for attempting to bring a charging cord into the facility.[2] The grievant's employment was terminated as a result of the disciplinary actions. The grievant timely grieved the disciplinary actions, and a hearing was held on May 30, 2024.[3] In a decision dated July 3, 2024, the hearing officer upheld the Group II Written Notice and reduced the Group III Written Notice to a Group II.[4] The hearing officer further upheld the grievant's termination of employment by accumulation of discipline.[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.

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[2] Agency Exs. 1, 2; *see* Hearing Decision at 1. The third Written Notice that was issued and dropped will not be addressed in this ruling.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 6.
[5] *Id.*
[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).

Contact with probationer/parolee

The grievant appears to argue on appeal that there was insufficient evidence presented that the grievant knew that the individual contacted on social media was a probationer. We interpret this argument as a claim that the agency's policy requires proof of such knowledge to substantiate the charge. The hearing officer found that the agency's policy did not require that the grievant knew the individual whom she contacted on social media was a probationer.[9] While we do not necessarily disagree with the hearing officer's overall conclusions, the hearing decision is unclear as to the basis for those conclusions and the analysis applied. Thus, we remand for further clarification of the hearing officer's analysis of the Written Notice.

The relevant agency policy (Operating Procedure 135.2)[10] prohibits fraternization between employees and probationers/parolees.[11] 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."[12] Examples of fraternization include "connections on social media."[13] EDR's review of this policy language does not reveal an explicit requirement that an employee must know the individual with whom they are fraternizing is in a prohibited category. However, it is a reasonable interpretation of the policy that an employee cannot be viewed as violating the policy unless they knew or should have known of the individual's status.[14]

The hearing officer's discussion in the decision about the Written Notice appears to consider certain factors that would lead to a conclusion that the grievant, at minimum, should have known that the individual whom she contacted on social media was a probationer/parolee.[15] However, the hearing officer's analysis is not clear on this point and does not sufficiently explain the standard applied – whether by reference to OP 135.2 or otherwise. In addition, we presume that the hearing officer found the grievant's conduct to have violated the policy because her contact to the probationer/parolee amounted to a "connection" on social media.[16] However, the hearing

[9] Hearing Decision at 5.
[10] Agency Ex. 30.
[11] *Id.* (Agency Exs. at 131).
[12] *Id.* (Agency Exs. at 127).
[13] *Id.*
[14] The policy also appears to require employees to report certain contacts, including "[i]ncidental encounters," to their supervisor or Organizational Unit Head by the next business day. *Id.* (Agency Exs. at 131). For such a violation, it is a reasonable interpretation that an employee cannot report such contacts unless they know a violative contact has occurred. Thus, unless an employee knows they have had contact with a known probationer/parolee, it would be difficult to find that an employee has a duty to report the contact. While there was some discussion during the hearing about an employee's duty to report, and the hearing decision makes some reference to this, *see* Hearing Decision at 5, the Group II Written Notice does not appear to include the grievant's alleged failure to report her contact with the probationer/parolee on social media as part of the misconduct. *See* Agency Ex. 1. The Written Notice only appears to state that the grievant violated agency policy by making contact with a probationer/parolee on social media. *Id.* Thus, EDR need not analyze any questions regarding any duty to report and the hearing officer's analysis on remand should refrain from addressing that issue as a basis for the Written Notice.
[15] Hearing Decision at 4-5.
[16] Testimony at hearing would seem to suggest that the agency's position was that the grievant violated the policy by creating such a "connection" on social media. Hearing Recording, File 2 at 1:40:17-1:40:57, 2:45:00-2:45:37 (testimony of Warden). On remand, the hearing officer will need to determine whether the greivant's conduct amounted to such a "connection."

officer's findings are also not clear on this point. Therefore, we are remanding for the hearing officer to clarify her findings, the standard applied to reach them, and the evidentiary basis for her determinations.

Cell phone cord

The grievant challenges the hearing officer's findings as to the Written Notice issued for attempting to introduce contraband (cell phone charging cord) into the facility because "the cords that the inmates already possess can charge cell phones." The grievant also characterizes her conduct as "accidental" and "[t]here was no intent shown that the grievant purposefully left the cord in her jacket pocket." The hearing officer seems to have agreed with the grievant that the misconduct was an accident.[17] Nevertheless, the hearing officer found that "mistake or not, the cord was in the facility proper and forbidden as a device to be in the facility."[18]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[19] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[20] 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.[21] 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.[22] 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 Written Notice charged the grievant with "attempting to bring in a charging cord" to the facility.[23] Agency policy (Operating Procedure 135.1) lists "[i]ntroducing or attempting to introduce contraband into a facility or to an inmate/probationer/parolee, or possession of contraband in the facility" as a Group III offense.[24] The definition of contraband under agency policy includes "[u]nauthorized electronic equipment including, but not limited to … any enabling components such as chargers, power cords . . . ."[25] The hearing officer essentially found the grievant to have failed to follow agency instructions about bringing prohibited items into the

[17] Hearing Decision at 5.
[18] *Id.*
[19] Va. Code § 2.2-3005.1(C).
[20] *Grievance Procedure Manual* § 5.9.
[21] *Rules for Conducting Grievance Hearings* § VI(B).
[22] *Grievance Procedure Manual* § 5.8.
[23] Agency Ex. 1.
[24] Agency Ex. 29 (Agency Exs. at 118). While the hearing officer reduced this Written Notice to a Group II from the originally issued Group III level, the agency did not appeal that determination. As such, the level of offense will not be addressed in this ruling.
[25] Agency Ex. 31 (Agency Exs. at 136).

facility.[26] Based on EDR's review, this determination would be consistent with finding that the grievant simply had "possession" of contraband in the facility. In short, the grievant's argument that the agency did not demonstrate evidence of intent was irrelevant based on the hearing officer's findings, which were not premised on an alleged attempt to introduce contraband, but rather that the grievant was found to have brought the cord into the facility. This analysis appears to be why the hearing officer reduced the level of discipline of this Written Notice to a Group II offense, rather than the Group III offense related to the attempted introduction of contraband. EDR has no basis to dispute the hearing officer's ultimate determination that the agency had presented sufficient evidence to carry its burden to establish a violation of agency policy by the grievant.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer to clarify her findings as to the fraternization written notice, as addressed above.

Both parties will have the opportunity to request administrative review of the hearing officer's reconsidered decision on any *new matter* addressed in the reconsideration decision (i.e., any matters not previously part of the original decision).[27] Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.[28]

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.[29] 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.[30] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[31]

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[26] Hearing Decision at 5.
[27] *See, e.g.*, EDR Ruling Nos. 2008-2055, 2008-2056.
[28] *See Grievance Procedure Manual* § 7.2.
[29] *Id.* § 7.2(d).
[30] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[31] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).