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ADMINISTRATIVE REVIEW

In the matter of the Virginia Department of Corrections
Ruling Number 2025-5738
August 9, 2024

The Virginia Department of Corrections (the "agency") 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 12104. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Numbers 12104, as found by the hearing officer, are as follows:[1]

> The Agency employed the Grievant as a corrections officer, without other active disciplinary actions.
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> The facts are mostly not in dispute. The Grievant usually leaves his medication in his car, but on [January 4, 2024] he had his medication wrapped in his knit hat in his coat pocket. During the entry search, the searching officer found the medications in the coat pocket and called the security supervisor. The undisputed facts are that the medications were prescribed for the Grievant, and he combined one day's doses in one prescription bottle. The prescription bottle used was for acetaminophen/hydrocodone (a controlled drug).
>
> The manner of carrying the medications reasonably raised suspicion by the Agency, which is charged with controlling and preventing contraband coming into the facility.

On February 16, 2024, the agency issued to the grievant a Group III Written Notice with termination for failure to follow safety and drug policies.[2] The grievant timely grieved the disciplinary action, and a hearing was held on June 24, 2024.[3] In a decision dated July 1, 2024, the hearing officer determined that the agency had "not met its burden of showing the Grievant's

[1] Decision of Hearing Officer, Case No. 12104 ("Hearing Decision"), July 1, 2024, at 4-5 (footnotes omitted).
[2] Agency Ex. 1; *see* Hearing Decision at 1.
[3] Hearing Decision at 1.

misconduct as charged in the Written Notice."[4] Accordingly, the hearing officer ordered the Group III Written Notice and accompanying termination to be rescinded.[5] The agency now appeals the hearing decision to EDR.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 its request for administrative review, the agency contends that the hearing officer disregarded "uncontradicted evidence" tending to show that the grievant "brought contraband in the form of prescription medication into the facility"[9] and did not explain why such evidence was disregarded. Moreover, the agency claims that, contrary to the hearing officer's conclusions, the grievant's conduct violated its Operating Procedure 445.2.[10]

Hearing Officer's Consideration of Evidence

The agency argues that undisputed evidence showed that

> at the time of the incident and disciplinary proceedings, Grievant brought various pills into the facility in a concealed fashion and never provided anything to management to demonstrate the pills all belonged to him. Nor did he obtain approval as required by policy to bring the pills into the facility.[11]

The agency contends that the hearing officer rejected and/or failed to consider this evidence. Specifically, the agency points to testimony from the searching officer that "she found a tightly wrapped toboggan in the jacket pocket of the Grievant"; testimony from the facility's security chief that neither narcotic medications nor "multiple different pills in a single bottle" is allowed at the facility; and the facility warden's testimony that the grievant did not report his medications to her or to his immediate supervisor.[12]

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[4] *Id.* at 6.
[5] *Id.* at 7.
[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] Request for Administrative Review at 4.
[10] *Id.* at 5-6.
[11] *Id.* at 5.
[12] *Id.* at 3.

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.

Both the agency and the hearing officer essentially describe the underlying facts of this matter as undisputed. Indeed, upon review of the hearing decision and the record as a whole, EDR is unable to identify any material differences in the agency's factual description of the conduct at issue and the facts ultimately found by the hearing officer.[17] Moreover, the hearing officer found that these events "reasonably raised suspicion" for the facility's management, who apparently began to investigate the incident. Accordingly, as the underlying facts are not only supported by the record but also not in apparent dispute, we decline to disturb the hearing decision on this basis.

As articulated in its request for administrative review, the agency's primary objection appears to be that the grievant presented evidence at the hearing that he did not initially present to management during his disciplinary due process, prior to the issuance of the Written Notice. In particular, the agency asserts that, although the grievant presented a personal statement during the due-process phase claiming the medication as his own daily prescriptions, he "never presented any documentation at the due process meeting from a physician . . . or copies of the bottles or the prescriptions to prove the three different medications found in the one bottle belonged to him."[18] EDR is not aware of any due-process principle or other standard that would have required the grievant to present such documentary proof to support his claims at a pre-disciplinary due process meeting.[19] Although the agency was not required to immediately accept the grievant's assertions that the medications at issue were prescribed to him, it is not clear whether any pre-disciplinary investigation attempted to resolve questions about the grievant's credibility by requesting supporting documentation of the type he ultimately presented at the hearing. We note that the agency does not appear to dispute that the medications at issue were duly prescribed to the grievant.

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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] To the extent the agency argues that the hearing officer failed to consider "uncontradicted evidence" presented during the hearing, the agency's appeal does not reflect what evidence the hearing officer disregarded or how it would lead to different factual findings of the events at issue in this case.
[18] Request for Administrative Review at 2.
[19] *See, e.g.* EDR Ruling No. 2020-5030 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985)) ("pre-disciplinary notice and opportunity to be heard need not be elaborate, nor resolve the merits of the discipline").

Accordingly, to the extent the hearing officer ultimately relied upon this evidence to find that the medication was prescribed to the grievant,[20] we find no error in his conclusions and decline to disturb the hearing decision on these grounds.

Application of Agency Policy

The agency argues that, contrary to the hearing officer's findings, its policies require employees "to bring one-days dosage for each prescription they have."[21] The agency further asserts that agency policy "clearly provide[s] how an employee must bring their medication into the facility."[22] If the agency has a policy that clearly states the requirements of how employees may bring medication into the facility, that certain medications are prohibited, or that prior notification and approval is required, it does not appear in the record and is not cited in the agency's appeal. Nevertheless, the agency contends that the hearing officer essentially disregarded the policies that are in the record.

The hearing officer acknowledged agency policy providing that Group III offenses include "[i]ntroducing or attempting to introduce contraband into a facility or to an inmate/probationer/parolee, or possession of contraband in the facility."[23] The hearing officer further defined "contraband" as "items forbidden for entry, possession, or removal from a corrections facility."[24] In assessing whether the grievant's medications were "forbidden," he referenced the agency's list of "Allowable Personal Items."[25] That list includes "[o]ne-day dose of prescription medications in a container that is clearly marked with the employee's name and prescription sheet or bottle."[26]

The hearing officer found that the prescription bottle wrapped in the grievant's hat contained six pills apparently matching the prescription bottle label, plus four other pills for two other prescriptions.[27] In finding that these pills represented one day's worth of the three prescriptions, the hearing officer concluded that "[a]pplicable policy specifically allows employees to bring into the facility one-day's dose of prescribed medication":

> The bottle containing the prescription medication was legitimately the Grievant's. While combining other prescription pills in the same bottle added to the Agency's suspicion, such conduct is not expressly prohibited by applicable policy or procedure. . . . All the pills were prescribed for the Grievant and contained in the Grievant's prescription bottle.[28]

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[20] *See, e.g.*, Agency Exs. 10, 11; Grievant's Exs. Pt. 2, 6; Grievant's Photographic Exs. 5-12.
[21] Request for Administrative Review at 5.
[22] *Id.*
[23] Hearing Decision at 3; *see* Agency Ex. 15, at 19.
[24] Hearing Decision 6. This definition of "contraband" is consistent with the definition that appears in the agency's policy on Screenings and Searches of Persons, which was apparently proffered post-hearing and ultimately not admitted. *See id.* at 1, n.2.
[25] *Id.* at 3; Agency Ex. 14.
[26] Agency Ex. 14, at 2.
[27] Hearing Decision at 5, n.3.
[28] *Id.* at 6.

Essentially, then, the hearing officer found that the agency failed to prove that the grievant's conduct, as alleged on the Written Notice, was misconduct under applicable agency or other policies.

Again, EDR is unable to identify a material discrepancy in the agency's interpretation of its Allowable Personal Items List and the hearing officer's findings. The agency does not appear to dispute that the pills in the prescription bottle were consistent with one day's dosage for each type of medication prescribed to the grievant, as the hearing officer found. Although the agency argues that employees should not bring medications "concealed in a suspicious fashion,"[29] the cited policies contain no provisions to reasonably suggest that otherwise-allowable items may be considered "contraband" if they are "concealed."[30]

To the extent the agency argues that the one day's dosage of pills in the prescription pill bottle was inconsistent with its interpretation of the Allowable Personal Items List, we cannot agree that the hearing officer was required to apply such an interpretation. We emphasize that an agency's interpretation of its own policies is afforded great deference. EDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference unless that interpretation is clearly erroneous or inconsistent with the express language of the policy.[31] As it relates to prescription medications specifically, the List is at least ambiguous, but does reference "medications" (plural) "in a container" (singular).[32] While the agency appears to disagree with such an interpretation, nothing herein should be read to diminish the agency's ultimate discretion not to admit items of concern into its facilities. For example, to the extent the agency argues that particular types of medication would not be permitted in the facility, it is entirely appropriate to deny an employee from bringing that medication into the facility. However, for purposes of establishing that the grievant violated agency policy or attempted to introduce contraband into the facility, EDR cannot find that the hearing officer failed to consider record evidence or policy language in the record that would support such a finding in this case.[33] The List does not reasonably suggest that an item in dispute automatically becomes "contraband" for disciplinary purposes if it is ultimately not approved after management review. Therefore, based on the foregoing, we find no basis to disturb the hearing officer's determination that the agency did not meet its burden to establish that the grievant's prescribed medications were "contraband," and we accordingly decline to disturb the hearing decision on these grounds.

[29] Request for Administrative Review at 5.
[30] Nothing in the record suggests that the grievant attempted to bring his medications into the facility by circumventing the agency's front-entry search procedures, through which the medications were discovered.
[31] *See, e.g.*, EDR Ruling No. 2020-4998.
[32] *See* Agency Ex. 14, at 2.
[33] Certain entries on the List note the need for review/approval by the chief of security before they will be permitted, but medication is not one of those expressly noting this requirement. *Id*.

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.[34] 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.[35] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[36]

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[34] *Grievance Procedure Manual* § 7.2(d).
[35] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[36] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).