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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2025-5749
August 15, 2024

The Department of Corrections (the "agency") 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 12095. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 12095, as found by the hearing officer, are as follows:[1]

> Prior to his dismissal, Grievant was a Correctional Officer at a Department of Corrections Facility. Grievant was first employed by the Agency in 2018 and described having a break in service from sometime in 2020 to sometime in 2022. Grievant began working as a Correctional Officer at the Facility in September 2023. Grievant had one active Group I Written Notice of disciplinary action for unprofessional conduct.
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> In January of 2024, the Facility was experiencing a high volume of drugs entering the compound resulting in multiple inmate overdoses. The Facility took various steps to try to identify the source or sources of the drugs coming into the Facility, including using drug detection dogs to screen employees and their vehicles.
>
> On January 15, 2024, the Facility was using a drug detection dog to screen employees as they entered the Facility. Lieutenant 1 testified that she worked with a Facility unit head to identify random dates to use drug detection dogs to conduct screening of Facility employees for drugs and drug residue. Lieutenant 1 testified that, during the screenings, if a dog detected illegal drugs or drug residue on an employee, the dog would "alert" its handler of its detection of drugs and the handler

[1] Decision of Hearing Officer, Case No. 12095 ("Hearing Decision"), July 19, 2024, at 2-4 (footnotes omitted).

would notify Lieutenant 1 that the dog had "alerted" on the employee. Lieutenant 1 testified that when a drug detection dog "alerts" on an employee, the standard operating procedure is to request that the employee consent to a search of their person (strip search) and their vehicle.

On January 15, 2024, Grievant arrived to work late. Because Grievant was late for the start of his shift, he was the only employee to be screened at the time of his arrival. Before Grievant entered the Facility from the parking lot, he was subject to screening by the drug detection dog. According to Lieutenant 1, the dog handler notified Lieutenant 1 that the dog "alerted" on Grievant. After Lieutenant 1 learned that the dog had "alerted" on Grievant, Lieutenant 1 escorted Grievant to her office and asked him to sign forms to consent to a search of his person (a strip search) and a search of his vehicle. Grievant responded to Lieutenant 1 that he would not complete the forms to consent to the searches. Lieutenant 1 then asked Grievant whether he intended to sign the forms to consent to the searches, and Grievant confirmed that he would not sign the forms. Lieutenant 1 then advised Grievant "you can have a seat out there, I'll be with you in a second." When Lieutenant 1 advised Grievant that he could have a "seat out there," she was referring to the front lobby area of the Facility. Grievant did not ask the Lieutenant or anyone else about the process for the search or who would perform the searches if he were to consent. Grievant did not advise the Lieutenant that he wished to speak to the Watch Commander, a human resources representative, or any other personnel at the Facility at that time.

Grievant then walked away from the Lieutenant toward the front lobby area of the Facility. Grievant, however, did not have a seat in the lobby area and wait for Lieutenant 1 as instructed. Instead, Grievant exited the Facility, walked across the parking lot, and entered his vehicle. Grievant testified that he went to his vehicle so that he could use his cell phone to call the Watch Commander.

When Lieutenant 1 realized that Grievant had not waited in the front lobby area, she also exited the Facility and walked out to Grievant's vehicle in the Facility parking lot. Lieutenant 1 asked Grievant if he would write a statement indicating his refusal to consent to the searches. Grievant told Lieutenant 1 that he was going to wait until [Lieutenant 2] or [a Facility Captain] came down. Grievant told Lieutenant 1 that he was not "refusing" and that he felt like "every time he came here it was something." Lieutenant 1 advised Grievant that if he was "not refusing," then he should come into the Facility and comply with the request for his consent to the searches. Lieutenant 1 told Grievant to leave his phone in his vehicle and come inside to comply. Grievant then exited his vehicle. As Grievant and Lieutenant 1 walked back toward the Facility entrance, they continued to discuss whether Grievant would consent to the searches. Grievant again told Lieutenant 1 that he would not consent to the searches.

The video recording of the exchange between Grievant and Lieutenant 1 was difficult to hear. However, Lieutenant 1 testified that she then asked Grievant

to leave and Grievant responded that he was "not going to leave the yard," indicating that he would not leave the Facility's premises. Grievant testified that when Lieutenant 1 asked him to leave, he responded that he was "not going to leave the yard" until he had an opportunity to speak with the Watch Commander. Lieutenant 1 then left the parking lot area and re-entered the Facility. Grievant remained in the parking lot area near the entrance to the Facility.

At the Warden's instruction, Facility personnel contacted a local law enforcement agency and requested that they come to the Facility to assist the Facility in getting Grievant to leave the premises.

Approximately eight minutes after Lieutenant 1 left Grievant in the parking lot area, Lieutenant 2 came out to the parking lot area and advised Grievant that if he was not going to consent to the searches, he needed to leave the premises. Grievant asked Lieutenant 2 what would happen after he left, and Lieutenant 2 advised Grievant that the Warden would call Grievant. Grievant then left the Facility premises.

Because Grievant left the Facility premises, Facility personnel contacted the local law enforcement agency and advised them that the Facility no longer needed their assistance.

On January 24, 2024, the agency issued to the grievant a Group III Written Notice with termination for failure to follow instructions and policy.[2] The grievant timely grieved the disciplinary action and a hearing was held on June 10, 2024.[3] In a decision dated July 19, 2024, the hearing officer reduced the Group III Written Notice to a Group II with a 10-day suspension.[4] Accordingly, the hearing officer ordered that the grievant was to be reinstated with back pay and benefits.[5] The agency 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. at 1-3; *see* Hearing Decision at 1.
[3] *See* Hearing Decision at 1.
[4] *Id.* at 8.
[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).

The agency challenges the following determination by the hearing officer:

> Although the Warden, Lieutenant 1, and Grievant all testified to their understanding that Agency policy required an employee who was "alerted" on by a drug detection dog to consent to a search of their person and their vehicle, there is insufficient evidence in the record to establish the requirements and parameters for such searches and to determine that Grievant's failure to consent in this case was a violation of an explicit Agency policy.[9]

The agency does not appear to have submitted an agency policy that would detail the expectation of employees to consent to searches in this context. However, even if the hearing officer had credited the testimony indicated about what "policy" requires, failure to follow policy is a Group II offense.[10] As the hearing officer upheld the Written Notice as a Group II offense, the outcome of this case would not be changed even if the hearing officer determined that the agency presented sufficient evidence to substantiate the misconduct related to a refusal to submit to a search. The pertinent issue is not whether the agency proffered a policy to establish a policy violation, but rather whether the agency presented a basis to substantiate that the grievant's misconduct rose to the level of a Group III offense. If the agency has a policy that establishes that an employee's refusal to consent to a search of their person and/or vehicle is a Group III offense, it was not presented at hearing and is not identified in the agency's appeal.[11]

The agency also challenges the hearing officer's assessment of the agency's argument[12] that the grievant's misconduct rose to the Group III level due to the seriousness of the misconduct. The hearing officer addressed this argument as follows:

> The Agency argued that Grievant's actions and his initial refusal to leave the Facility premises were a risk to safety, resulted in a weakening of security, and were sufficiently disruptive to the workplace to rise to the level of a Group III offense. The Agency primarily argued that the number of Facility personnel involved during the incident with Grievant, including the Warden weakened security and was disruptive because those personnel were taken away from their other security duties while they dealt with Grievant. Based on the evidence, it appeared that Lieutenant 1 and a special investigation unit officer with a body camera were both engaged with Grievant throughout the incident, approximately 15 minutes. The Warden was not at the Facility at the time, but Lieutenant 1 called him repeatedly to apprise him of the situation. Lieutenant 2 also was involved in the incident with Grievant because he was called by Lieutenant 1 to assist with the situation with Grievant. Beyond making the argument, the Agency did not provide any evidence as to how security was weakened, or safety risked for the approximately 15 minutes the two lieutenants onsite were engaged with Grievant.

[9] Hearing Decision at 5.
[10] DHRM Policy 1.60, *Standards of Conduct*, at 8.
[11] Such a policy was also not indicated on the Written Notice, which cited to state and agency policy involving Alcohol and Other Drugs and employee responsibilities to comply with drug testing, which was not at issue in this case. *See* Hearing Decision at 5; Agency Exs. at 1-3.
[12] This argument appears to have been presented during the agency's closing statement rather than during its presentation of evidence.

> The Agency also pointed to the fact that Facility personnel contacted a local law enforcement agency when Grievant initially refused to leave the Facility premises. The Agency argued that the Facility contacted local law enforcement because they could not wait for the situation with Grievant to escalate and potentially get out of control. This Hearing Officer will not dispute an Agency's discretion to take precautionary measures; however, for the purposes of determining the appropriate level of discipline, the evidence shows that the situation with Grievant did not escalate and that after Grievant spoke with Lieutenant 2, as he had requested, Grievant left the Facility premises without the need for intervention by local law enforcement.[13]

In its appeal, the agency states that the "Warden testified that the personnel required to be involved in the matter who were pulled from their posts while they dealt with Grievant, including the Shift Commander who was in charge of the facility, caused a disruption to the operations of the facility and a weakening of security such that the Group II was properly elevated to a Group III pursuant to Agency policy."[14] EDR reviewed the testimony cited by the agency.[15] While the Warden testified that he determined that the grievant's misconduct rose to the Group III level, it is not discernible from the testimony the basis for that determination. Further, the testimony does not appear to describe how the grievant's conduct was a risk to safety or weakened the security of the facility, as the hearing officer stated in the decision.[16] Consequently, EDR is unable to identify evidence in the record that the hearing officer failed to consider in making her assessment of the grievant's misconduct quoted above.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[17] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[18] 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.[19] 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.[20] 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 agency has not presented any basis in its appeal for EDR to find that the hearing officer's findings were not supported by the record or otherwise arbitrary.

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[13] Hearing Decision at 7.
[14] Request for Administrative Review at 3.
[15] *See* Hearing Recording at 2:06:00-2:35:00.
[16] Hearing Decision at 7.
[17] Va. Code § 2.2-3005.1(C).
[18] *Grievance Procedure Manual* § 5.9.
[19] *Rules for Conducting Grievance Hearings* § VI(B).
[20] *Grievance Procedure Manual* § 5.8.

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.[21] 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.[22] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[23]

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