

EMILY S. ELLIOTT
DIRECTOR



COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2151
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2020-5087
May 21, 2020

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”)¹ administratively review the hearing officer’s decision in Case Number 11471. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11471, as found by the hearing officer, are as follows:²

The Department of Corrections [the “agency”] employed Grievant as a Corrections Lieutenant at one of its facilities. She had been employed by the Agency for approximately 20 years. The Warden described Grievant as a really good employee except for the facts giving rise to this grievance.

Grievant worked in an office inside a Facility. When Grievant was in the office, the unit manager, security staff, and the counselor would enter and exit the office throughout the day.

The Inmate worked as a house manager in the office where Grievant worked. Grievant did not select him for the position. He was responsible for cleaning, taking care of building supplies, counting food carts, and several other duties relating to inmates. When he was working, either Grievant or Lieutenant T was to supervise the Inmate. Grievant was not always present when the Inmate was in the office. In those instances, Lieutenant T would be responsible for supervising the Inmate. Even when Grievant was in the office, she might not be responsible for supervising the Inmate.

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Decision of Hearing Officer, Case No. 11471 (“Hearing Decision”), April 10, 2020, at 2-6 (citations omitted).

The Inmate told the Investigator he was in the office sometimes five to six hours a day. The Inmate could not remain the office all day. He had to leave the office to participate in count and performed duties in the housing unit. Grievant was notified on September 30, 2019 that she was supposed to search the Inmate (and any other inmates) coming into the office. The Inmate had to be in his cell during count. Count occurred several times each day. Grievant worked at least one day prior to October 10, 2019 when she failed to search the Inmate upon his entry into the office.

The Inmate was infatuated with Grievant claiming he loved her and wanted to marry her. The Inmate was over ten years younger than Grievant.

The Agency received an anonymous tip about Grievant and the Inmate. The Agency searched the Inmate's cell and discovered numerous items he was not supposed to have. For example, the Inmate had the Warden's telephone number even though the Warden did not give the Inmate that information. The Inmate had numerous documents relating to Grievant because he was obsessed with Grievant.

Grievant previously worked in a different housing unit. She placed items she had at the first housing unit into a "banker's box" and took them with her to the second housing unit. Grievant placed the box in a closet in the office. The Inmate had access to the closet to obtain cleaning supplies. He could obtain items from the box when either Grievant or Lieutenant T was not supervising him closely. The Inmate told the Investigator he had been advised not to go through any boxes, but said, "Well I moved those things." Grievant did not authorize the Inmate to take any items from the box. The Investigator did not ask Lieutenant T if he gave any of the items in the box to the Inmate.

The Agency Investigator interviewed the Inmate on October 9, 2019 and October 10, 2019. He told the Investigator that he cared for Grievant and that many of the items located in his cell came from Officer J. The Inmate told the Investigator he had asked Officer J to look up information on Grievant and let him see it. He said that Officer J allowed him to go to the interview room. Officer J would access mylife.com to look up information on Grievant and other people including Officer T for the Inmate. The Inmate wrote down Grievant's birthdate as November 1 because November 1 was listed as her birthdate on the website. Grievant's birthday was not November 1st. The Inmate had a calendar where he wrote Grievant's birthday as November 11. The Inmate had a note where he had written Grievant's home address and telephone number.

The Inmate told the Investigator he obtained Grievant's CPR certificates from inside of a composition book. He later said the certificates were in a box in the office.

The Inmate told the Investigator he never asked Grievant for anything. The Inmate claimed he had information on Grievant's vehicle from the website Officer J showed the Inmate. When asked if Grievant knew that the Inmate had personal information on Grievant to include her children's names, her father's names, etc.,

the Inmate said Grievant did not know that and that he did not get that information from her.

Grievant intended to consolidate her bills so she wrote out the payee names of all her credit card and other accounts. She kept the document in her day-planner which she placed on her desk when she was working. She did not know that the Inmate had taken her list. When asked about how he obtained the list containing the retailer names of Grievant's accounts and bills, the Inmate initially stated he did not recall where he obtained the information. The Inmate said the bills belonged to Grievant and he had gotten the list in a box. He later said he had gotten the list from Grievant and put it in a box and then got it later.

When asked how the Inmate knew where Grievant worked part-time, the Inmate said, "Well, I've known that for a while" from people talking. When asked why he had Officer T's information and Ms. D's personal email address, the Inmate said, "Some of that I just grabbed." He said sometimes he takes responsibility for staff's belongings and that sometimes he grabs things he did not mean to grab.

The Inmate said he spent a lot of time talking to Grievant in the office. He said he obtained information about Grievant's vehicles from Grievant. Grievant denied providing the Inmate with her personal information.

When asked about a memorandum sent by the Major, the Inmate said that Lieutenant W gave the memorandum to him. He said he knew he was not supposed to have the memorandum. The memorandum stated that effective September 9, 2019, most offenders would not be allowed to frequent the second and fourth floors of the housing unit.

The Inmate had a drawing showing his first name and Grievant's first name. The Inmate told the Investigator he had obtained the paper from the fourth level and had another offender make the drawing.

The Inmate had a photo of Grievant and other officers. The photo was taken when Grievant worked at another facility. Grievant kept the photo in a box in a storage area. The Inmate told the Investigator the photo came from an old box that "I shouldn't have never had." He said Grievant did not give him the photo.

The Inmate had a composition book and pen to write. The Inmate told the Investigator he obtained the pen out of a cabinet and not from Grievant. The Inmate had written a letter to Grievant in the composition book professing his love for Grievant. He did not give the letter to Grievant. Grievant did not receive the letter and was not aware of it. The Inmate wrote a note to Grievant and on the side of the page appeared "I love you!!!" written in green ink. The writing appears to be the Inmate's writing.

The Inmate had a bag containing snacks. The Inmate told the Investigator it was Grievant's bag and it was left out and he took it.

The Inmate had a calendar showing when staff worked. The Inmate told the Investigator he obtained the calendar from the office.

The Inmate had a usb charging cord. He told the Investigator he obtained it from a trashcan and used it to charge his JP5 player.

The Inmate had Internal Incident Reports written by Grievant. The Inmate told the Investigator the reports were in a “pink clip and when I grabbed I just that’s what I had. I didn’t intend to do anything with it.” The Incident Report was on a bulletin board where everyone coming into the office could see it. Grievant did not give the document to the Inmate.

The Inmate had a post-it note with shoe sizes written on the note. It showed a woman’s shoe size of 8.5. The Inmate told the Investigator the sizes were Grievant’s shoe sizes and that Grievant provided him with the information. The Agency was unable to determine whose handwriting appeared on the note. Grievant told the Investigator her shoe size was 9.

When asked if he had any physical contact such as holding hands, touching back, etc. with Grievant, the Inmate told the Investigator “Not that I can recall. I haven’t had sex with her. I haven’t kissed her.” The Inmate said he had not made sexually explicit comments to Grievant.

The Inmate believed he was on the edge of “walking” (being released from prison) because someone else had confessed to his crimes for which he was incarcerated. No evidence was presented to confirm the Inmate’s belief.

The Inmate said he and Grievant had a conversation about her bills and then Grievant wrote down her bills to provide it to the Inmate. The Inmate said he put it in a box and got it from that box later.

The Inmate said he obtained a piece of paper that contained Grievant’s name and other information from a trashcan.

The Inmate had written down information about a corrections officer working at the Facility. He had written email addresses including Grievant’s email address. He had written Grievant’s Aunt’s name. The Inmate said he knew about Grievant’s aunt because people talk and he knew Grievant’s aunt worked in the kitchen. The Inmate said that conversation about Grievant’s husband “was probably overheard.”

The Inmate had Grievant’s CPR certificate. The Inmate told the Investigator it was inside a book outside of a supervisor’s office.

On October 7, 2019, Inmate H went to the office were Grievant was working. Inmate H was an “older” inmate. The Inmate was also in the office. Inmate H wanted ice and Grievant said she would provide it to him. In response, Inmate H told Grievant “I love you and I appreciate all you do for us in the housing unit.”

Grievant replied to Inmate H, "I love you too. Come on, let's go get the ice." Grievant did not take Inmate H "seriously." When the Inmate heard Grievant's comment, he told Grievant, "I love you too." Grievant did not reply to the Inmate. The Investigator did not infer a romantic relationship between Grievant and Inmate H.

Grievant was trained to report if an inmate said "I love you" to her. She could have reported the Inmate's comments to the Watch Commander when she ended her shift on October 7, 2019.

The Investigator asked the Inmate how he obtained Grievant's computer log in user identification. The Inmate said he did not know.

The Inmate told the Investigator he got things off of the copier for Grievant and both shifts allowed him to do that even though he knew he was not supposed to do so.

Grievant completed her shift on Monday, October 7, 2019 and left the Facility. Grievant reported to work on October 10, 2019 and went to the morning briefing. She was told to report to the administration building. The Investigator interviewed Grievant on October 10, 2019. Grievant "volunteered" to the Investigator information about her interaction with Inmate H and Grievant.

The Counselor worked on the second floor in an area adjacent to where Grievant worked. She did not supervise the Inmate. She was concerned because it seemed like the Inmate was "always" in the office. She observed Grievant and the Inmate sometimes sitting close and talking. She did not know what they were talking about. When she came into the room the Inmate would move away from Grievant although he did not always do so. The Counselor preferred to keep inmates an "arm's distance" from her. The Counselor told Lieutenant T of her concerns about Grievant and the Inmate.

The Counselor did not observe any physical contact between Grievant and the Inmate. She did not hear any inappropriate conversations between Grievant and the Inmate. She did not know if Grievant called for the Inmate to come to the office or if the Inmate simply chose to go to the office.

On November 18, 2019, the agency issued to the grievant a Group III Written Notice with removal for fraternization, as defined by its Operating Procedure ("OP") 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*.³ The grievant timely grieved the disciplinary action, and a hearing was held on March 4, 2020.⁴ In a decision dated April 10, 2020, the hearing officer concluded that a Group III Written Notice was not supported because "[n]o credible evidence was presented showing that Grievant knowingly allowed the Inmate to obtain items

³ Agency Ex. 1; see Hearing Decision at 1; Agency Ex. 7.

⁴ See Hearing Decision at 1.

relating to her”⁵ or that she “provided the Inmate with her personal information.”⁶ However, the hearing officer found that the grievant “should not have placed herself in a position where another employee would reasonably question her interaction with an offender”⁷ and that her “failure to timely report the Inmate’s comment [that he loved her] . . . [was] sufficient to support the issuance of a Group I Written Notice for unsatisfactory work performance.”⁸ The hearing officer ordered the agency to reinstate the grievant.⁹ The agency now appeals the hearing 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 . . . procedural compliance with the grievance procedure”¹⁰ 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.¹¹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹² The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that the hearing officer erred in his assessment of the grievant’s supervisory responsibilities and in the relative credibility he assigned to statements by the Counselor, the inmate, and the grievant.¹³ The agency also asserts more generally that it proved fraternization by demonstrating that, “[a]t best, the Grievant . . . nurtured a comfortable enough relationship with the inmate to either share her personal information directly with him, or to discuss her personal information with others in the [inmate’s] presence.”¹⁴ Finally, the agency contends that the hearing officer failed to consider aggravating circumstances that, in its view, should merit more serious disciplinary action than a Group I Written Notice.¹⁵

Hearing officers are authorized to make “findings of fact as to the material issues in the case”¹⁶ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁷ 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.¹⁸ Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the

⁵ *Id.* at 7.

⁶ *Id.* at 8.

⁷ *Id.*

⁸ *Id.* at 9.

⁹ *Id.* at 9-10.

¹⁰ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹¹ *See Grievance Procedure Manual* § 6.4(3).

¹² Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹³ *See Request for Administrative Review* at 2-3.

¹⁴ *Id.* at 5.

¹⁵ *See id.* at 6-7.

¹⁶ Va. Code § 2.2-3005.1(C).

¹⁷ *Grievance Procedure Manual* § 5.9.

¹⁸ *Rules for Conducting Grievance Hearings* § VI(B).

evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹⁹ 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 upon 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.

Consideration of Evidence

In describing the nature of grievant's offense, the Group III Written Notice issued by the agency stated that "[a] cell search of an offender resulted in finding documents containing [the grievant]'s personal information"²⁰ The offense description indicated that the agency attributed the inmate's possession of such documents and information to the grievant's improper relationship with him, in violation of its fraternization prohibitions.²¹

Acknowledging that the inmate possessed many personal items and information related to the grievant, the hearing officer nevertheless reasoned that disciplinary action could be warranted only with respect to the grievant's own charged misconduct; specifically, fraternization.²² Thus, the hearing officer assessed whether the evidence showed that the inmate obtained the grievant's information through an association with her that would violate OP 135.2.²³ Ultimately, the hearing officer found no credible evidence that the grievant knew of or consented to the inmate's possession of the items and information, attributing it instead to the inmate's infatuation with the grievant and "pattern of theft of items relating to" her.²⁴

The record contains evidence to support the hearing officer's conclusions in this regard. According to the agency's investigation report, the inmate repeatedly expressed affection and admiration for the grievant but gave inconsistent answers as to whether the grievant ever gave him any of the items or other information found in his cell.²⁵ The inmate stated that he took certain of the grievant's documents and personal items without her knowledge, wrote personal notes and messages to himself about her, and obtained information relating to her from other employees.²⁶ However, the inmate also made certain claims to the investigator that the grievant had given him information about her vehicles, bills, and shoe sizes and that she had discussed love and romance with him.²⁷ The grievant denied these claims in her hearing testimony.²⁸ Ultimately, the hearing officer declined to find the inmate's statements credibly inculpatory of the grievant.²⁹ Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider

¹⁹ *Grievance Procedure Manual* § 5.8.

²⁰ Agency Ex. 1, at 1.

²¹ *Id.*

²² Hearing Decision at 7; *see* Agency Ex. 1.

²³ *See* Hearing Decision at 7-9.

²⁴ *Id.* at 7-8.

²⁵ Agency Ex. 4, at 3-5.

²⁶ *Id.* at 3-5; *see, e.g., id.* at 24-27, 31-32, 37, 43.

²⁷ *Id.* at 4-5.

²⁸ Hearing Recording at 3:50:40-3:51:12, 4:06:25-4:08:12 (Grievant's testimony); *see also* Agency Ex. 4, at 6-7, 17-18.

²⁹ Hearing Decision at 7.

potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.³⁰

The agency argues that evidence other than the inmate's possession of her personal information points to an inappropriate association with him. In particular, the agency cites testimony by the Counselor that the inmate would spend several hours in the office when the grievant was there, often talking closely with the grievant in a "college" atmosphere.³¹ Further, the agency contends that the inmate's knowledge of the grievant's personal affairs indicates that she was much too casual in the inmate's presence and that, contrary to the hearing officer's findings, she was responsible for supervising the inmate and failed to do so effectively.

Upon a thorough review of the record, EDR finds no basis to disturb the hearing decision on these grounds. Consistent with the agency's arguments, the hearing officer acknowledged that the grievant's close office communications with the inmate and failure to report his expression(s) of love could warrant disciplinary action. Accordingly, the hearing officer upheld discipline for unsatisfactory work performance, a Group I offense.³² The agency argues that these lesser offenses are also probative of the more serious charge that the inmate obtained the grievant's personal information due to their improper relationship.³³ Ultimately, however, the agency bore the burden to prove that the grievant fraternized with the inmate by a preponderance of the evidence. 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. Here, not finding additional facts to support the fraternization charge, the hearing officer concluded that the evidence was not sufficient to support the grievant's culpability in a relationship that would violate OP 135.2 and merit a Group III Written Notice. Similarly, the hearing officer found the evidence insufficient to show that the inmate possessed improper information due to the grievant's inadequate supervision, as opposed to the acts and/or omissions of other employees.³⁴ Nothing in the record suggests that the hearing officer's conclusions in this regard were an abuse of discretion or otherwise improper, and under such circumstances EDR cannot substitute its own judgment for that reflected in the hearing decision.

Aggravating Circumstances

Finally, the agency contends that, considering the extent of the sensitive information the inmate was able to obtain, including the grievant's computer login name and other agency documents,³⁵ the hearing officer should have upheld a higher level of disciplinary action based on

³⁰ See, e.g., EDR Ruling No. 2020-4976.

³¹ See Hearing Recording at 3:08:30-3:09:30 (Counselor's testimony).

³² See Hearing Decision at 8-9.

³³ See Request for Administrative Review at 5-6.

³⁴ Hearing Decision at 7-8.

³⁵ The investigation report noted that among the illicit items found in the inmate's cell was a composition notebook, in which he had recorded personal notes and miscellaneous information related to the grievant. See Agency Ex. 4, at 2-3. According to the report, the user identification name for the grievant's employee computer account was written in the notebook. *Id.* at 3. While the report suggested that the grievant must have logged in to her account at a time when the inmate was standing very close behind her, the hearing officer made no specific findings on this issue.

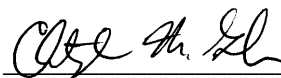
aggravating circumstances. Where a hearing officer sustains fewer than all of the agency's charges, they may reduce the discipline to the maximum reasonable level sustainable under law and policy so long as the agency has not indicated that it desires a lesser penalty to be imposed on fewer charges.³⁶ In this case, however, the hearing officer did not sustain discipline based upon the grievant's alleged failure to supervise, concluding that it was unclear who should have been supervising the inmate when he obtained various items or information.³⁷ Rather, the hearing officer sustained discipline essentially for the grievant's failure to adequately discourage an inappropriate relationship, or the appearance of one.

EDR also notes that, while the agency may reasonably be alarmed by the inmate's ability to obtain such information, the record does not necessarily show that it considered these details aggravating for the offenses charged or sustained. Neither the grievant's computer credential nor other agency information were among the several details specifically cited on the Group III Written Notice, either in the description of the conduct charged or in the field for potential aggravating circumstances.³⁸ Likewise, such information was not noted in the investigator's report summary,³⁹ and a review of the record does not disclose what effect, if any, the inmate's improper possession of agency information may have had on agency operations.

Because the hearing officer did not sustain discipline based on the grievant's failure to supervise the inmate, and because the evidence as to aggravating circumstances is susceptible to varying interpretations, EDR cannot say that the hearing officer's decision to uphold discipline only at the Group I level was erroneous, lacking record support, or otherwise unreasonable. Thus, EDR declines to disturb the decision on this basis.

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.⁴⁰ 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.⁴¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴²



Christopher M. Grab
Director
Office of Employment Dispute Resolution

³⁶ *Rules for Conducting Grievance Hearings* § VI(B)(1). Here, the agency has not indicated any desire for a lesser penalty than the maximum reasonable.

³⁷ Hearing Decision at 7.

³⁸ See Agency Ex. 1, at 1.

³⁹ See Agency Ex. 4, at 1.

⁴⁰ *Grievance Procedure Manual* § 7.2(d).

⁴¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴² *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).