

Issue: Group III Written Notice with Termination (excessive use of force); Hearing Date: 05/18/17; Decision Issued: 05/22/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10931; Outcome: Full Relief. **Fee Addendum issued 07/05/17 awarding \$3,275.00.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10931**

Hearing Date: May 18, 2017

Decision Issued: May 22, 2017

#### **PROCEDURAL HISTORY**

On November 20, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for use of excessive force.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 24, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 18, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant is also referred to as Mr. F in this decision.

On August 28, 2016 at approximately 9:25 AM, the Inmate was in the Yard with several other inmates. The Inmate began fighting with another inmate and Corrections Officers responded to stop the fight. Two Corrections K-9s responded to the fight. The Inmate kicked one of the dogs.

The Inmate was placed face down on the ground. His hands were handcuffed behind his back. His legs were shackled. The Inmate was pulled from the ground and placed on his feet by a male and a female corrections officer who began escorting him towards the Medical unit. The Inmate resisted the two officers as they tried to place him on his feet. The Inmate began walking as he was escorted by the two officers out of the Yard. When they reached the gate of the Yard, the Inmate began struggling with the two officers and hit the female officer knocking her to the ground. The Inmate also fell to the ground. Several other officers approached the group to provide assistance. The Inmate was held down for several seconds as the corrections officers regained control of the inmate. Mr. M, Mr. L, Mr. R, and Mr. F provided assistance. The group placed the Inmate on his feet again and he began walking. As he walked, he continued to struggle with the corrections officers. He pushed backward and then forward and then

to his left and right to break the hold of the corrections officers. He was able to stop the group from moving forward. He then refused to stand and fell facedown onto the concrete walkway. The corrections officers were pulled down with the Inmate and attempted to regain control of the Inmate.

The Captain ordered that the Inmate be transported using a four person carry back to his cell instead of the Medical Unit. A four person carry meant that four corrections officers would carry the Inmate facedown with one corrections officer grasping one of the Inmate's four limbs.

Mr. R held the Inmate's right arm. Mr. M held the Inmate's left arm. Mr. F held the Inmate's left leg. Mr. L held the Inmate's right leg. Mr. F and Mr. L held the Inmate's legs so his knees were bent with the soles of his feet facing upwards. This reduced the opportunity for the Inmate to kick them. Officer S followed the group as they carried the Inmate. His role was to provide assistance, if necessary, to the four corrections officers.

The Inmate continued to struggle as he was carried by the four corrections officers. His pants fell to his knees exposing his undershorts.

The door to the entrance way was approximately 41 to 42 inches wide. The door was not wide enough for the two corrections officer to pass through the door while holding the Inmate between them. As they approached the entrance door, the two officer in the front moved a few inches to the right so that Mr. R could pass through the door first and the Inmate and Mr. M could pass through the door immediately after Mr. R. After all of the group passed through the door, they continued walking into the vestibule area and to the door to the shakedown area.

The shakedown area door was approximately 36 inches wide. The group moved a few inches to the right of the door to allow Mr. R to pass through the door first. He approached the door with his shoulders square to the door. Mr. M turned his right shoulder forward<sup>1</sup> and his left shoulder backward as he turned his body counter clockwise to face the Inmate. The officers turned the Inmate to his side so that his left hip was higher than his right hip. They stopped briefly and then squeezed themselves through the doorway.

The Inmate's head did not hit the metal door as they stopped to position themselves and then pass through the doorway. The four corrections officers did not use more force than was necessary to move the Inmate to his cell.

The Inmate falsely alleged the four corrections officers intentionally hit his head against the wall. The Agency began an investigation.

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<sup>1</sup> A use of force instructor testified that if Mr. M wanted to shove the Inmate's head into the wall, Mr. M would have kept his shoulders square to the wall as the group moved to the right and approached the wall.

## CONCLUSIONS OF POLICY

The Agency alleged that Grievant facilitated an offender's head being struck against the wall while carrying the offender. The Agency contends Grievant's behavior justifies the issuance of a Group III Written Notice with removal.

The Agency has not met its burden of proof. The disciplinary action must be reversed and Grievant reinstated to his former position.

No credible evidence was presented to show that the Inmate's head hit a wall while Grievant carried the Inmate. This conclusion is supported by several reasons. First, Mr. M testified that he did not observe the Inmate's head hit the wall. His testimony was credible. Second, Mr. R testified that he did not observe the Inmate's head hit the wall. His testimony was credible. Third, Mr. L testified that he did not observe the Inmate's head hit the wall. His testimony was credible. Fourth, Mr. F testified that he did not observe the Inmate's head hit the wall. His testimony was credible. Fifth, Mr. S followed behind the four corrections officers who held the Inmate. He was slightly taller than the other corrections officers and he was looking towards the Inmate. While standing approximately three feet from the group, he did not observe the Inmate's head hit the wall. His testimony was credible. Sixth, the Agency's case rests on two videos of the event. The Facility's camera system consisted of a series of pictures taken in one second increments. The videos did not show all of the movement of the corrections officers and the Inmate. None of the video images show the Inmate's head hitting the wall.

The Agency argued that the video showed that the four corrections officers aimed the Inmate's head towards the wall and moved towards the wall so that the Inmate's head hit the wall. This argument is not persuasive.

The video showed that when the group reached a door, they moved slightly to the right before passing through the door. They did this because the entrance door was approximately 41 to 42 inches wide and the shakedown door was approximately 36 inches wide. When Mr. R and Mr. M stood side by side, the width across their shoulders was 41 inches. The Inmate's width was at least 20 inches. All three men could not pass through the shakedown door at the same time. They move to the right to allow Mr. R to pass through the door first and then the Inmate and Mr. M could pass through the door. The group followed this procedure when they passed to the entrance door prior to reaching the shakedown door. Thus, moving a few inches to the right of the door did not establish that the corrections officers intended to hit the Inmate's head against the wall.

The Agency argued that the corrections officers should have secured the Inmate in the Yard, placed him into a wheelchair and rolled him to the pod. Although this approach could have been taken, it was not an option available to the corrections officers. The Captain ordered that the Inmate be removed from the Yard using a four person carry. The four corrections officers were obligated to follow that order otherwise

they would risk receiving disciplinary action for refusing to follow a supervisor's instructions.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the

specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>2</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>2</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**

**DIVISION OF HEARINGS**

**ADDENDUM TO DECISION OF HEARING OFFICER**

In re:

**Case No: 10931-A**

Addendum Issued: July 5, 2017

**DISCUSSION**

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.<sup>3</sup> For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.<sup>4</sup>

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Counsel submitted a petition showing 25.00 hours worked. Grievant should be awarded attorney's fees at a rate of \$131 per hour.

**AWARD**

The grievant is awarded attorneys' fees in the amount of \$3,275.00. The Agency may pay these fees directly to Grievant's Counsel.

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<sup>3</sup> Va. Code § 2.2-3005.1(A).

<sup>4</sup> *Grievance Procedure Manual § 7.2(e); Rules for Conducting Grievance Hearings § VI(D)*.



## APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer