



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11818

Hearing Date: July 29, 2022
Decision Issued: August 18, 2022

PROCEDURAL HISTORY

On February 24, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for use of excessive force.

On March 16, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 4, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 29, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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. Grievant began working for the Agency in April 2020. No evidence of prior active disciplinary action was introduced during the hearing.

On October 8, 2021, the Inmate consumed "spice", a type of illegal drug that caused him to behave aggressively, erratically, and unpredictably.

At approximately 4:46 p.m. on October 8, 2021, Officer H instructed the Inmate to go to his cell in the Pod, but the Inmate refused. Officer H placed handcuffs on the Inmate so that his hands were behind his back. The Inmate struggled and attempted to get away from Officer H. The Inmate went to the ground and Officer H placed his knee on the Inmate's back to hold the Inmate down. The Inmate struggled and was able to get out from under Officer H. Officer H tossed the Inmate to the side to keep the Inmate faced down. Officer H kept his knee on the Inmate's back and he used two hands to hold the back of the Inmate's left arm down to the floor. The Inmate was not in leg restraints and could freely kick his legs. Even though Officer H was "twice the size" of the Inmate, Officer H had great difficulty in trying to control the Inmate.

A "10-33" was called over the radio. Grievant and several other Corrections Officers heard the radio call. Grievant understood the call to mean there was an inmate assaulting a staff member. Grievant immediately began moving towards the Pod in order to "help a buddy."

The Sergeant entered the Pod and ran towards the Inmate. He got down on the floor to Officer H's left and tried to hold down the Inmate's legs.

Two K9 Officers entered the room with their dogs and stood in the Pod.

Officer S, Officer 4 and Officer M entered the Pod and went to the Inmate who was being held face down on the floor. Officer S went to the Inmate's left leg and tried to hold it down. Officer M went to the Inmate's head and tried to hold down the Inmate's neck.¹ Officer 4 went to the bottom of the Inmate's right foot.

Grievant entered the pod.² When Grievant observed the Inmate, he did not know that the Inmate was handcuffed. The Inmate's behavior and movement was consistent with someone who was not handcuffed and someone who clearly was not under control. Grievant did not know whether the Inmate possessed a weapon. Grievant did not know that the Inmate had taken spice. Grievant went to the Inmate's left side while the Inmate was faced down. Grievant kneeled down and used his shin to pin the Inmate's left arm. Officer S was on Grievant's right.

Officer S observed that the Inmate was "violently fighting." As soon as Officer S grabbed the Inmate's left leg, the Inmate started kicking Officer S. The Inmate kicked Officer S in the face. Officer S said, "He's kicking watch out!" Officer S yelled, "He got me in the face!" Grievant heard Officer S yelling. Officer S testified that he had already been kicked by the Inmate before Grievant used a knee strike on the Inmate.

The Sergeant yelled for someone to get leg restraints. Officer S tried to cross the Inmate's legs to keep him from kicking while they attempted to put leg restraints on the Inmate.

Grievant pinned the Inmate's left arm with Grievant's shin. The Inmate attempted to roll. The Inmate tried to reach into his pants. As Grievant tried to hold the Inmate down, Grievant struck the Inmate's left rib area three times with his right knee while telling the Inmate to stop.³ Grievant's biggest concern was he did not know if the Inmate had a

¹ Officer M was also disciplined for using a knee strike.

² At the time Grievant entered the pod, he was the sixth corrections officer involved in trying to control the Inmate. An additional 15 corrections officers other than the K9 officers entered the pod and assisted or were ready to assist.

³ Grievant did not knee the Inmate more than three times because he realized the strikes were ineffective.

weapon and the Inmate was trying to get up off the floor. Grievant was concerned the Inmate would injure him or another officer.

Grievant did not know the Inmate was handcuffed. Someone said “make sure he is restrained.” Grievant looked and realized that the Inmate was in handcuffs. Grievant yelled out, “He is handcuffed.” Someone said, “Check them; make sure they are on there good.” Grievant checked the cuffs to make sure they were on properly.

Sergeant S called for a spit mask. Grievant asked to be relieved since he carried a spit mask. Grievant gave Sergeant S a spit mask and Grievant was no longer involved in the struggle.

Grievant did not intend to hurt the Inmate. Grievant intended to draw the Inmate’s attention so that the Inmate could become compliant.

The Inmate was examined by medical department staff. He was given Narcan to counter his drug use. The Inmate had no injuries.

Officer S left the Facility and went to the Hospital. As a result of the Inmate’s kicks, Officer S may have had a mild concussion. His hand was swollen. His right thumb was sprained and his left ring finger was bent by the Inmate.

The Warden testified that an employee could use a strike if the employee felt a strike was needed to protect himself and others. The Warden testified an employee could use a “disruption technique” to get an inmate to become compliant.⁴ The Warden testified he issued disciplinary action because the knee strikes were outside of policy.

CONCLUSIONS OF POLICY

The Agency disciplined Grievant because, while in a kneeling position, Grievant used his right knee to strike the Inmate three times on the Inmate’s left side. The Agency argued Grievant’s use of force was excessive and unreasonable thereby justifying disciplinary action.

Operating Procedure 420.1 governs Use of Force. This policy became effective October 1, 2019. Under this policy:

Employees have a responsibility, consistent with their self-protection and to protect offenders, other employees, and members of the community others who are threatened by the actions of any facility offender inmate or probationer/parolee. Facility employees are also required to prevent escapes and abscondments, maintain order and control within the facility, and protect state property.

⁴ The term “disruption technique” appears in the Agency’s training materials.

1. Employees may use all necessary and suitable means to perform these duties, including the use of physical force. ***

B. The use of force is restricted to instances of justifiable self-defense, protection of others, protection of property, prevention of escapes, and to maintain or regain control, and then only as a last resort and in accordance with appropriate statutory authority.

1. The wearing of specified protective gear and adherence to sanitation procedures is required in all planned use of force incidents to prevent injury or the transmission of disease.

2. Force will not be used for vindictive or retaliatory purposes. The use of force is never justifiable as punishment. ***

III. Amount of Force

A. Force will be used only as a method of control in accordance with this operating procedure.

1. Non-force methods of control should be used whenever possible and the minimum necessary force should be used to gain control only when non-force methods have failed or are not appropriate.

2. All security personnel are trained in the approved methods of control tactics and the use of force as a last resort to control offenders inmates and probationers/parolees.

B. Employees are permitted to use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm.

1. Only the amount of force that is reasonably necessary to overcome resistance, mitigate an incident, or gain control under the circumstances, is permissible.

2. The use of excessive or unreasonable force by an employee may lead to criminal prosecution, a civil suit, or disciplinary action against the employee.

C. The appropriate type and amount of force used by an employee (e.g., the kind of weapon used, the area of the body struck, etc.) depends on the circumstances of the particular incident. Controlling factors include:

1. The potential consequences if nothing is done

2. The degree of force threatened or used by the offender inmate or probationer/parolee, including whether the offender inmate or probationer/parolee possesses a weapon that could be used to cause physical injury

3. The employee's reasonable perception of the danger of death or serious physical injury

4. Any alternatives available to control the situation without the use of force

D. Less lethal force may be used in the following situations: ***

7. To compel an offender inmate and probationer/parolee or group of offenders inmates and probationers/parolees to comply with direct orders when no quick or immediate alternative method of persuasion is effective and other types of force are deemed not appropriate.

Operating Procedure 420.1 defines excessive force as, “[t]hat amount of force that is beyond what is reasonably required to prevent harm or to control a particular situation or that is not justified by the circumstances.” Grievant was expected to exercise his “best judgment” when complying with the Use of Force policy.

The Agency has not met its burden of proof to support disciplinary action for the following reasons:

First, Grievant was authorized to use less than lethal force on the Inmate “to compel an offender inmate ... to comply with direct orders.”

Second, the Agency’s policy did not prohibit the use of knee strikes.

Third, the Agency’s training did not teach employees that they were prohibited from using knee strikes. The Agency’s Academy Training Instructor testified there is nothing in the policy saying an employee cannot “do knee strike, if necessary” and that there could be situations where an employee could hit an inmate “if absolutely necessary.”

Fourth, Operating Procedure 420.1 recognizes an employees’ “responsibility, consistent with their self-protection and to protect offenders, other employees” Grievant was permitted to use “as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm.” The policy recognizes that an employee may exercise judgment when applying an amount of force. Grievant perceived the fight as creating a danger of serious physical injury to himself and the other officers. The Inmate did not appear to be handcuffed while fighting the corrections officers. Grievant did not know if the Inmate had a weapon. Grievant knew the Inmate was kicking Officer S. Grievant struck the Inmate in order to protect himself and other Corrections Officers. He exercised his judgment to attempt to disrupt the Inmate’s behavior.

Fifth, at the time Grievant struck the Inmate, Grievant did not intend to harm or punish the Inmate. Grievant was not being vindictive or attempting to punish the Inmate.

Sixth, Grievant used an amount of force that did not injure the Inmate. Grievant stopped using knee strikes once he realized they were ineffective at changing the Inmate’s behavior.

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

The Agency argued that Operating Procedure 420.1 does not authorize knee strikes and that knee strikes were not taught to employees as an approved technique. Of greater significance, however, is that the policy does not prohibit use of knee strikes by an employee attempting to protect himself or others. The policy authorized Grievant to protect himself and others. Grievant's objective was to protect himself and his co-workers.

The Agency argued that the knee strikes just inflicted pain and were not effective in gaining compliance. The evidence showed that Grievant's knee strikes did not injure the Inmate. There is no reason to believe that the Inmate experienced pain because of Grievant's knee strikes.

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. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor

Richmond, VA 23219

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11818-R

Reconsideration Decision Issued: March 23, 2023

RECONSIDERATION DECISION

On February 24, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for use of excessive force.¹

On March 16, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 4, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 29, 2022, a hearing was held by remote conference.

On August 18, 2022, the Hearing Officer issued the Original Hearing Decision in this matter. This decision reflects the Hearing Officer's view of this matter. The Original Hearing Decision correctly states the facts of this matter based on the entire record of evidence the Hearing Officer considered to be credible, material, and persuasive.

¹ Va. Code § 2.2-3007 provides that DOC employees terminated in the grounds of inmate abuse "may appeal their termination only through the Department of Human Resource Management applicable grievance procedures, which shall **not** include successive grievance steps or the formal hearing provided in § 2.2-3005." (Emphasis added.)

The Written Notice refers to violation of Operating Procedure 135.2, which provides, "[a]buse or any form of corporal punishment is prohibited." The Agency's Representative described Grievant's behavior as an abuse of the offender in violation of Operating Procedure 132.2. The Warden testified he believed the knee strikes were physical abuse of an offender contrary to Section XIV(B)(17) of Operating Procedure 135.1, Standards of Conduct. This section prohibits, "[p]hysical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of inmates/probationers/parolees." Because OEDR referred the matter to the Hearing Officer without objection from the parties, the Hearing Officer will assume he has jurisdiction to hear this matter.

On October 5, 2022, the Office of Employment Dispute Resolution issued Ruling 2023-5452 remanding this matter to the Hearing Officer for reconsideration.

The Hearing Officer provided the parties with the opportunity to present additional evidence and/or argument. The parties chose to issue additional argument. The parties agreed to submit briefs no later than October 31, 2022.

Upon consideration of the EDR Ruling and briefs from the parties, the Hearing Officer will uphold the Group III Written Notice with removal. The Original Hearing Decision is amended to uphold the Group III Written Notice with removal.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer