



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11874

Hearing Date: February 17, 2023
Decision Issued: March 31, 2023

PROCEDURAL HISTORY

On July 28, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying key information.

On August 9, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 29, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 17, 2023, a hearing was held by remote conference.

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. 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 Captain at one of its facilities. He had been employed by the Agency for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing.

On June 18, 2022, Grievant was working as the day shift Watch Commander. Sergeant C was notified by radio to respond to the Unit because an Inmate was refusing to allow staff to secure a tray slot on his cell door. Sergeant C attempted to de-escalate the Inmate but was unsuccessful. Corrections staff determined that the Inmate had broken off a piece of plastic from a television and shaped it in the form of an approximately 7 inch long knife. After the Inmate repeatedly refused to give up the knife, Sergeant C sprayed the Inmate with OC spray. Grievant arrived at the cell and also attempted to de-escalate the Inmate without success. The Inmate repeatedly threatened to kill staff. Sergeant W sprayed the Inmate with OC spray. Lieutenant B also later sprayed the Inmate with OC spray. The Inmate refused to give up his weapon.

Grievant contacted the Warden about using the canine unit as part of the cell extraction. The Warden and his supervisors discussed what to do. They decided to assemble a team of corrections officers and conduct a cell extraction. The Inmate's cell was approximately 6 or 7 feet wide and 9 or 10 feet deep.

The cell extraction team consisted of Officer 1, Officer 2, Officer 3, Officer 4, Officer 5, Officer JH, and Officer BM. A canine Officer positioned his dog to the right side of the cell door to engage the Inmate if he exited the cell. The extraction team formed a line to enter the cell. Officer 1 and Officer 2 held shields. Extraction team members were wearing helmets and protective gear.

Grievant ordered two corrections officers to open the door. They slid the door open a few inches and the Inmate turned his right shoulder towards the opening and pushed his elbow out of the cell while his body remained inside. The officers tried to pin the Inmate's arm in the door but were unsuccessful. The Inmate moved his arm back into the cell. The officers pulled the door open again. The Canine Officer allowed the dog to enter the cell and the Inmate began stabbing the top of the dog's head. The Inmate stabbed the dog approximately five times. The Agency later determined that the dog was not injured.

Once the dog engaged the Inmate, the cell door was opened wider and the extraction team rushed into the cell. Chaos followed. Grievant also entered the cell and stood over top of the corrections officers as they attempted to restrain the Inmate. Officer 1 struck the Inmate with the shield and forced the Inmate to the ground. As they struggled, the shield was pushed to the side. The Inmate attempted to stab Officer 1 in the chest and face. Officer 1 used several stunning techniques by striking the Inmate on the side of the head because the Inmate kept fighting and trying to kill him.

The dog engaged the Inmate but then bit Officer 2. Grievant yelled "get the dog" to the Canine Officer. Grievant grabbed Officer 2 and told him to "get out, get out." Grievant then yelled "get him to medical." Several corrections officers ordered the Inmate to "stop resisting!" but the Inmate continued to fight.

The Inmate was on the floor next to the Inmate's bed. Officer 5 was facing down with the lower part of his body on the Inmate's bed. Officer 5's upper body was over top of the Inmate towards the right side of the Inmate's body. The Inmate was on his side as the officers tried to push him onto his stomach. Officer 5 was holding handcuffs in his right hand. He began hitting the Inmate in the head with the handcuffs and saying, "That's how the dog felt mother f—ker. That's how the f—king dog felt, mother f--ker." Officer M hit the Inmate approximately 45 times over an approximately 34 second time period, pausing four times and appearing to reposition/reestablish his grip.

Officer M's behavior of hitting the Inmate constituted physical abuse under the Agency's Use of Force Policy. Calling the Inmate "mother f—ker" was verbal abuse according to the Agency's Manager.

Officer 1 was able to get the weapon out of the Inmate's hand. Staff yelled several times, "the knife is out." The Inmate continued to struggle and fight.

Corrections officers secured the Inmate with leg irons but the Inmate continued to struggle. A corrections officer was able to get a handcuff on the Inmate's right wrist but his left arm remained free. The Inmate refused orders to roll over on his stomach so that handcuffs could be secured. Officer 1 used another stunning technique by jabbing the bottom of his forearm and elbow into the Inmate's left shoulder. The Inmate rolled onto his stomach and the handcuffs were attached to his left wrist.

Officer 1 suffered abrasions on both arms and back. Officer 2 was bitten by the canine on the right calf. Both staff were sent for medical evaluation and treatment.

Grievant instructed his staff to write incident reports and to describe their use of force.

Grievant reviewed the video that was available to him. He did not review the body camera videos of other staff because they were not available to him. In other words, at the time Grievant wrote incident reports, he did not know that Officer 1's video camera showed that Officer 5 had hit the Inmate with handcuffs.

The video camera for Officer TB does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer 4 does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer 2 does not show Officer 5 hitting the Inmate. It has the sound of the words, "mother f—ker" (18:19:07) but it is unclear who is saying the words.

The video camera for Officer MB does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Sergeant C does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer ZL does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer VC does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Grievant shows him referring to his watch to say the date and time and the name of the inmate involved in the cell extraction. It shows the bottom half of Officer 5's body as he is laying on the bed. The view of the top part of Officer 5's body is partially blocked by other corrections officers. Grievant points with his left arm and says, "get cuffs on there (18:19:34)." After other employees say the "knife is out", Grievant says "roll him over and get him cuffed." The video has a faint sound of "mother" (18:19:08)

but does not reveal who said this. To the extent Officer 5 is visible in the video, the camera shows the left side of Officer 5 with Officer 5 looking down and away from Grievant.

The video camera for Officer 1 shows the right arm of Officer 5 who is holding handcuffs. Officer 5 repeatedly strikes the Inmate (18:18:59) and says (18:19:08) “That’s how the dog felt mother f—ker. That’s how the dog felt mother f—ker.” Officer 5 hit the Inmate for the final time at 18:19:33. Officer 1 told investigators he did not see Officer 5 strike the Inmate on the head because he was focused on trying to remove the weapon from the Inmate that the Inmate was using to try to stab Officer 1.

The video camera for Lieutenant AN does not show Officer 5 hitting the Inmate. The sound does not record Officer 5 mentioning how the dog felt.

The video camera for Officer 3 does not show Officer 5 hitting the Inmate. The sound does not record Officer 5 mentioning how the dog felt.

The video camera for Officer 5 stopped recording before he began hitting the Inmate.

Officer 5 wrote an incident report stating that he “gave [the Inmate] a stunning technique by striking his head.”¹ Officer 5 did not write that he used handcuffs to hit the Inmate. He did not write that he had called the Inmate a “mother f—ker.”

Grievant wrote an Incident Report on June 18, 2022. He did not mention the details of the cell extraction inside the cell and did not mention that Officer 5 had hit the Inmate and called the Inmate a “mother f—ker.”

Grievant wrote an Internal Incident Report on June 22, 2022. He did not mention Officer 5 hitting the Inmate and calling the Inmate a “mother f—ker.” The incident reports of the officers participating in the cell extraction were attached to the Internal Incident Report.

During a due process meeting on July 20, 2022, Grievant said that he did not see Officer 5’s actions and that he could not report what he did not see. He stated that the video of body cameras was not available to him at the time he wrote his reports.

CONCLUSIONS OF POLICY

The Agency alleged:

At no time during the cell extraction did you instruct [Officer 5] to stop hitting [the Inmate] with handcuffs nor did you report the excessive use of force taken by [Officer 5] on your incident report or during your interview with SIU.

¹ Agency Exhibit p. 122.

*** By not fully disclosing the details of the interactions between [Officer 5] and [the Inmate], you undermined your effectiveness as a supervisor. *** In addition, your actions were in violation of Operating Procedure 038.1 Reporting Serious or Unusual Incident, because you did not provide a complete reporting of the incident. *** Further, because you failed to stop the excessive use of force by [Officer 5], your actions were in violation of 135.2, Rules Governing Employees Conduct with Offenders. *** Moreover, because you failed, as the supervisor of the cell extraction, to stop the excessive use of force used by [Officer 5], your actions were in accordance with Section IV, paragraph F, 3 of OP 135.2. *** Lastly, OP 135.1 requires employee[s] to treat inmates in accordance with the aforementioned Operating Procedure 135.2.²

The Agency's disciplinary action rests entirely on the Agency's conclusion that Grievant observed Officer 5 hitting the Inmate with handcuffs approximately 45 times in 34 seconds and hearing Officer 5 say "That's how the dog felt mother f---ker. That's how the f---king dog felt, mother f--ker."

The Agency did not establish that Grievant observed Officer 5 hitting the Inmate with handcuffs for several reasons. First, Grievant denied seeing Officer 5 hit the Inmate with handcuffs. Grievant's demeanor during the hearing showed he was telling the truth. Second, Officer 5 was facing downward as he used the handcuffs in his right hand to hit the Inmate in the head. The Inmate was laying on the floor with his head on the floor. Three or four other corrections officers were crouched on top of the Inmate trying to restrain the Inmate. Their bodies were side by side often without gaps between them. Grievant stood towards the bottom of the Inmate. He was focused on the placement of restraints on the Inmate. His view of Officer 5's right hand was blocked by the bodies of the other corrections officers. His view of Officer 5's right hand was blocked by Officer 5's head and shoulders. Every officer was engaged in continuous motion with his arms and body. The motion of Officer 5's right hand would not stand out as unusual. Third, Grievant was closest to Officer 5 when Grievant said "get cuffs on that" as Grievant extended his left arm and pointed toward the Inmate's wrist. At that point, Officer 5 had just ended hitting the Inmate. During the approximately 38 seconds prior to Grievant saying "get cuffs on that" Grievant was not in a position to see Officer 5's right hand. During those 38 seconds, Grievant was focused on getting the dog out of the cell. He said "get the dog off" and had the Canine Officer remove the dog. He then focused on Officer 2 who was bitten by the dog. He grabbed Officer 2's left arm and said "come on, get out, get out." He then got closer to the Inmate and said "stop resisting" and "where's the weapon?" At this point, Grievant was facing Officer 5's left side and could see the left side of Officer 5's face. Grievant could not see Officer 5's right hand. By the time Grievant said "get cuffs on that", he had not been in a position to see Officer 5's right hand. Fourth, none of the other corrections officers noticed that Officer 5 was hitting the Inmate with handcuffs.

² Agency Exhibit p. 4.

Grievant did not stop Officer 5 from hitting the Inmate because he did not see Officer 5 hitting the Inmate. Grievant did not write an incident report describing Officer 5 hitting the Inmate because he did not know Officer 5 had hit the Inmate.

The Agency argued that Grievant's video camera was positioned at his chest and did not reflect what he actually observed. The Agency alleged that Grievant must have observed Officer 5 because Grievant was standing in close proximity to Officer 5 and when looking down should have observed Officer 5 hitting the Inmate. The Agency's arguments are speculation and not sufficient to refute Grievant's credible denial and other supporting evidence showing he did not observe Officer 5 hitting the Inmate.

The Agency did not establish that Grievant heard Officer 5 say, "That's how the dog felt mother f—ker. That's how the dog felt mother f—ker" for several reasons. First, Grievant denied hearing Officer 5's statement about how the dog felt. His testimony was credible. Second, the environment was loud. Employees were yelling. Only one video camera recorded the sound of Officer 5's full sentences of "That's how the dog felt mother f—ker. That's how the dog felt mother f—ker." Third, Officer 5's statements occurred during a period of five seconds. At the time of Officer 5's statements, Grievant was at least six feet away from Officer 5 with two corrections officers between him and Officer 5. Other officers were yelling at the Inmate limiting Grievant's ability to hear Officer 5. Fourth, only one body camera recorded the full sentences Officer 5 used. Grievant's body camera did not record Officer 5's full statements. If Grievant's body camera could not record all of Officer 5's words, there is little reason to believe that Grievant could have heard Officer 5's words.

Grievant did not write an incident report describing Officer 5's statements to the Inmate because Grievant did not hear them.

Grievant did not falsify incident reports by omitting information of which he was unaware.

The Agency's concern about having supervisors who hide or tolerate the use of excessive force by subordinates reflects good management. The Agency's concern, however, does not apply to Grievant. There is no basis for disciplinary action in this case.

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]

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

[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