



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11885**

Hearing Date: March 22, 2023  
Decision Issued: July 10, 2023

**PROCEDURAL HISTORY**

On July 28, 2022, Grievant was issued a Group III Written Notice of disciplinary action with an 80-hour suspension for physical abuse<sup>1</sup>, use of force.

On August 23, 2022, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 26, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 2023, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative  
Witnesses

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<sup>1</sup> Because Grievant was not terminated from employment, Va. Code § 2.2-3007 does not deny jurisdiction to the Hearing Officer.

## **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 employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding Close Range Subject Control. He was taught Mechanical Advantage Hold Control ("M.A.C.H."). Under this training:

Absolutely NO strikes are to be taught during this Controlled F.O.R.C.E. ® VADOC BCO Phase I Close Range Subject Control Training Course.

On June 22, 2022, the Inmate blocked the tray slot in his cell door. 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, the Inmate was sprayed with OC spray. The Inmate repeatedly threaten to kill staff. Grievant heard the Inmate say he was going to kill staff

because he wanted an extra meal. The Inmate was again sprayed with OC spray. The Inmate refused to give up his weapon. Agency managers decided to assemble a cell extraction team to enter the cell and remove the weapon.

Grievant was part of the cell extraction team. The team formed a line to enter the cell. Grievant was holding a shield at the front of the line. Upon entering the cell, Grievant struck the Inmate with the shield as Grievant had been trained and knocked the Inmate down to the floor. Grievant's shield went to the side and Grievant rolled on top of the Inmate along with other staff attempting to restrain the Inmate. While on the ground, the Inmate continued to fight staff and tried to stab and hit Grievant in his chest. The Inmate wounded Grievant.

Grievant used stunning techniques and struck the Inmate on the head to try to get the Inmate to comply with orders and retrieve the weapon from the Inmate's hand. The Inmate continued to be combative. Grievant was able to remove the knife. Grievant used a stunning technique to hit the Inmate in the head to gain control. Grievant used another stunning technique to the side of the Inmate's head. Grievant's objective was to use his forearm to hit the Inmate in the back of the shoulder to distract him. Grievant believed that the strike caused the Inmate to stop resisting. The Inmate complied with Grievant's orders and handcuffs were secured on the Inmate. Staff secured leg irons on the Inmate. A safety hood was placed on the Inmate to prevent him from spitting on staff. The Inmate was removed from the cell in handcuffs and leg irons. Grievant's strikes did not injure the Inmate.

Grievant wrote an incident report stating, "While trying to restrain the inmate I utilized several stunning techniques to the head and face area due to his continued disruptive behavior and resisting all attempts for restrains to be placed on him."<sup>2</sup>

Throughout the cell extraction until the Inmate was in control, corrections officers instructed the Inmate to stop resisting. The Inmate disregarded that instruction and continue to fight corrections staff.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force." Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

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<sup>2</sup> Agency Exhibit p. 121.

<sup>3</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

DOC Operating Procedure 420.1 governs Use of force.

Section I(B) provides:

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.

Section III(B) provides:

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.

Section V(5) provides:

When no alternative method of persuasion has proven effective, the institution's cell extraction team will be utilized when it becomes necessary to enter the cell and physically remove the offender inmate by force.

Operating Procedure 135.2 governs Rules of Conduct Governing Employees Relationships with Offenders. Abuse is defined as:

The improper use or treatment of an individual that directly or indirectly affects an individual negatively; abuse may include, but is not limited to, any improper intentional act that causes physical, mental, or emotional injury to an individual.

Section I(2) provides:

Abuse or any form of corporal punishment or hazing is prohibited.

Group III offenses include, "Violation of Operating Procedure 135.2, Rules of Conduct Governing Employees Relationships with Offenders."<sup>4</sup> On June 22, 2022, Grievant punched the Inmate several times including striking the Inmate after the knife was removed. His behavior was an improper treatment of an individual by using excessive force. His actions constituted abuse. Grievant violated Operating Procedure 135.2

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<sup>4</sup> See, Operating Procedure 135.1.

because of his improper treatment of the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee or in lieu of removal suspend an employee up to 30 workdays. Accordingly, Grievant's 80-hour suspension must be upheld.

Grievant argued that his force was not excessive. Indeed, the evidence showed that Grievant's strikes caused the Inmate to comply with instructions and Grievant did not continue the strikes once the Inmate began complying with instructions. In prior EDR rulings, EDR has interpreted the Agency's Use of Force policy within the context of the training employees receive regarding how to use force. In other words, if employees apply force using techniques not trained by the Agency, the employees are likely to have engaged in using excessive force. In this case, Grievant was not trained to use strikes while using force to control an inmate. Because Grievant was not trained to use strikes, the Agency's assessment that Grievant used excessive force must stand even though the force used caused the Inmate to stop resisting.

Grievant argued that he was acting in self-defense because the Inmate had attempted to stab him. Grievant had stab wounds caused by the Inmate. Grievant's strikes appeared to be in response to the Inmate's refusal to follow instructions, but not in self-defense. In other words, Grievant's strikes did not appear designed to prevent the Inmate from striking Grievant or other staff. One of the strikes came after the knife had been removed from the Inmate.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with an 80-hour suspension is **upheld**.

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<sup>5</sup> Va. Code § 2.2-3005.

## 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 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 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.<sup>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.