Issue: Misapplication of policy (biased investigation); Hearing Date: 01/07/03; Decision Date: 01/14/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5597/5598

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 5597 & 5598

Hearing Date: January 7, 2003
Decision Issued: January 14, 2003

PROCEDURAL ISSUES

The agency determined that the grievances filed by grievant on February 4, 2002 and February 22, 2002 were not qualified for a hearing. Grievant requested a qualification and compliance ruling from the Department of Employment Dispute Resolution (EDR). The Director of EDR issued a ruling that qualified both grievances for hearing, and consolidated the two grievances into one hearing.[1]

As part of the relief sought by grievant, he requested that the two special agents who investigated the incident be disciplined, that both agents be denied access to the facility at which he works, that one of the two agents be removed from his current position, and that an external agency investigate this matter. The Grievance Procedure provides that taking any adverse action against an

[1] Exhibit 3. EDR *Qualification and Compliance Ruling of Director*, Ruling Numbers 2002-068 and 110, November 15, 2002.

employee, and any other relief that is inconsistent with the grievance statute or procedure are forms of relief not available to a grievant.[2]

APPEARANCES

Grievant
Assistant for Grievant
Five witnesses for Grievant
Warden
Advocate for Agency
Two witnesses for Agency

ISSUES

Was an investigation conducted by Internal Affairs agents biased? Was the investigation to determine whether grievant had a criminal record justified? Did the agency inappropriately reveal personal information about the grievant?

FINDINGS OF FACT

The grievant filed timely grievances alleging that an Internal Affairs investigation was biased against him.[3] Following failure to resolve the grievance at the third resolution step, the agency head disqualified the grievances for a hearing. Following an appeal to EDR, the grievances were qualified for hearing and consolidated into one hearing. The Department of Corrections (Hereinafter referred to as "agency") has employed grievant for over seven years. He is a sergeant.

During the day shift on June 25, 2001, grievant and two other corrections officers periodically entered a cell where a 52-year-old inmate was confined in five-point restraints.[4] A fourth officer videotaped every entry into the cell. The inmate had a history as a self-mutilator and had bitten a corrections officer on June 24, 2001.[5] During each entry, the officers carefully released the restraints one at a time, while shackling and handcuffing the inmate as they did so. The inmate was allowed to stand up, use the toilet if necessary, and eat meals. Afterwards, the inmate was returned to the cot and again placed in five-point restraints. The inmate was docile and generally cooperative during the six encounters shown on videotape during the hearing.

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[2] Section 5.9(b)5 & 6, EDR *Grievance Procedure Manual*, effective July 1, 2001
[3] Exhibits 1 & 2. Grievance Forms A, filed February 4, 2002 and February 22, 2002, respectively.
[4] An inmate in five-point restraints is confined on a cot in a supine position. Both hands and both legs are strapped to the cot, and a strap is placed across the chest.
[5] Exhibit 8. *Serious Incident Report*, June 24, 2001.

On one occasion, however, the inmate appeared to be raising his shoulders and or chest as the chest strap was being fastened. Procedure requires that chest straps be fitted snugly enough to restrict movement but not so tightly as to inhibit normal breathing. Grievant placed his closed fist on the inmate's abdomen and applied pressure on the stomach muscles so as to force the inmate to relax his chest and shoulders. The inmate resisted for several seconds but then cooperated and grievant removed his fist. The inmate was not injured and did not complain of injury during the procedure or thereafter.

An assistant warden viewed the videotape on July 13, 2001 and believed that grievant was using excessive force. He reported the matter to the warden.[6] The warden requested that an investigation be conducted, as he routinely does when anyone alleges the use of excessive force. An investigator was assigned to the case on July 17, 2001. The agent had been an investigator for less than one month at the time this case was assigned to him. From July through September 2001, the agent aggressively investigated the case, interviewing at least 15 people including the inmate and the grievant. He also made a request for grievant's record from a county sheriff. The record indicated that grievant had been charged with various offenses but that all charges had been either nol prossed or dismissed for lack of evidence.[7]

The investigator completed his report and submitted it to his supervisor, the Assistant Chief of Investigations. The report was then given to the Assistant Inspector General, who sent a copy to the warden. The warden did not disseminate the report to anyone else. The warden concluded that, while the use of pressure in the abdomen is an appropriate compliance technique, grievant should have used the heel of his palm – not his fist – when applying pressure. The special agent concluded that grievant used more force than was necessary. Therefore, grievant was counseled accordingly and written documentation was placed in his fact file.[8]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the

[6] Exhibit 14, Tab A. Memorandum from assistant warden to warden, July 13, 2001.
[7] Exhibit 14. *Report of Investigation*, September 24, 2001.
[8] Exhibit 1. Memorandum from warden to grievant, January 30, 2002. NOTE: Fact files are maintained for employees as a record of noteworthy occurrences during the year. The fact file is not part of an employee's official personnel file. The information in fact files is used primarily to memorialize events which may later be deemed worthy of mention in an employee's annual performance evaluation.

need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove her claim by a preponderance of the evidence.[9]

Grievant contends that the special agent investigated his arrest record without justification. The special agent had initially been told that he was investigating a case that might involve assault. In such cases, it is reasonable to determine whether the person under investigation has a history of physical assault. Accordingly, it was reasonable for the special agent to check with local law enforcement authorities to ascertain whether grievant had any convictions for assault or similar offenses. Therefore, the agent's inquiry to establish whether grievant had a history of related offenses appears to have been routine and reasonable.

Grievant notes that a criminal record check was not conducted for the other person being investigated. However, the other person was not directly involved in the incident, rather he had previously advised the grievant that applying pressure on the abdomen was an available option to obtain inmate compliance. Thus, the other person was being investigated only for a potential policy violation, not a criminal offense. Since this other employee is not the one who physically interacted with the inmate, it would not have been reasonable to investigate whether he had a criminal record for assault.

Grievant alleges that the special agent violated his right to privacy by discussing with another sergeant grievant's education, employment history, and military service. The agent acknowledges that he did discuss during an interview the facts that grievant had been to college, had worked at other correctional

[9] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.

facilities, and is currently in the National Guard. Grievant had not previously kept this information secret and some of grievant's coworkers knew these facts. Since these were matters of somewhat general knowledge, grievant's right of privacy was not violated. The agent did not disclose any confidential information about the grievant.

Grievant alleges that the special agent, and another agent who conducted some of the interviews, conspired so as to prejudice the outcome of the investigation against grievant. However, grievant has presented no testimony or evidence to support such an allegation. There were no conversations between the agents or documents that would suggest anything other than an attempt to fully investigate the charges made against grievant. Grievant faults the agent for failing to ask certain questions during the interview and for not allowing grievant to submit his own written statement. Grievant is not a trained investigator. The special agent's direct supervisor testified that the special agent's interview technique was an approved method and that his investigation was thorough and well done.

The special agent concluded that grievant applied "enormous" pressure to the inmate. The videotape reflects that grievant did not punch or hit the inmate. Grievant did place his fist on the inmate's abdomen and did apply significant pressure for several seconds. However, the videotape does not reflect that the amount of pressure applied was either shocking or inordinate. While reasonable minds may differ about the degree of pressure grievant used, the use of the word "enormous" appears unjustified based on the videotape.

Grievant proffered as evidence material from a self-defense course taught by the agency.[10] The training outline points out that a fist can be used as a personal weapon and that the solar plexus and pit of the stomach are vulnerable areas of the body. However, this course outline has no relevance to the incident for which grievant was counseled. At the time of the incident, the inmate was alone with three correctional officers and was in four-point restraints, i.e., his hands and legs were already fully restrained by leather straps. Not only was the inmate not struggling but he was also completely incapable of making any kind of offensive movement against the corrections officers. Thus, self-defense techniques had no application whatsoever in this situation.

Grievant has also proffered information outlining a test to determine whether the force used in an incident was reasonable or excessive.[11] The court originally applied a four-part test in Johnson v. Glick, 481 F.2d 1028 (1973), but the Supreme Court subsequently eliminated the fourth part of this standard in Graham v. Conner, 109 S.Ct. 1865 (1989). However, the issue of whether grievant used excessive force is beyond the purview of this grievance because

[10] Exhibit 5. Agency Self-Defense Training Checklist and Trainer Outline.
[11] Exhibit 7. DCJS Defensive Tactics Instructor School, *Keiko: The Process of Training,* September 22, 1997.

the issues presented in the grievance (See ISSUES above) relate to conduct of the investigation – not whether a counseling memorandum was warranted.

Grievant has not identified, and the hearing officer cannot find, any portion of the agency's Internal Affairs Unit policy[12] that was violated during this investigation.

Grievant seeks to have the written counseling memorandum (Letter of Reprimand) removed from his fact file. Written counseling memoranda are not disciplinary actions. The Standards of Conduct provide that such memoranda are informal corrective actions designed to prevent a recurrence of similar behavior in the future. Accordingly, such a memorandum does not qualify for a grievance hearing because it does not constitute formal discipline.[13] Therefore, a hearing officer has no authority to direct the removal of such a memorandum from a fact file.

This decision does not draw any conclusions as to whether grievant was directed to use force, whether he used excessive force, or whether he used an improper technique because these were not the issues raised by this grievance. This decision does conclude that: there is no evidence to prove that the investigation was biased; the inquiry to determine whether grievant had a related criminal record was reasonable and justified; and, the agency did not inappropriately disclose any information that violated the grievant's right of privacy.

DECISION

The grievant has failed to show, by a preponderance of the evidence, that the agency misapplied policy in its conduct of the investigation. Therefore, the grievant's request for relief is hereby DENIED.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

[12] Exhibit 13. Procedure Number 10-4, *Internal Affairs Unit*, July 1, 1993.
[13] Section 4.1(c)8, EDR *Grievance Procedure Manual*, effective July 1, 2001.

2. 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.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[14]

[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]

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David J. Latham, Esq.
Hearing Officer

[14] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.