

Issue: Group II Written Notice (use of excessive force, failure to report incident); Hearing  
Date: 05/31/06; Decision Issued: 06/06/06; Agency: DOC; AHO: Thomas P. Walk, Esq.;  
Case No. 8339; Outcome: Employee granted full relief

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF  
EMPLOYMENT DISPUTE RESOLUTION

DEDR CASE NO. 8339

**DECISION OF HEARING OFFICER**

**PROCEDURAL HISTORY**

This matter was initiated by the filing of the grievance against the Department of Corrections on February 27, 2006. I was appointed as Hearing Officer on May 4, 2006. I received the Notice of Appointment on May 8. A pre-hearing telephone conference call was scheduled for May 17 but the grievant failed to make himself available for the call. I entered a Pre-Hearing Order on that date setting the matter for hearing on May 31. A copy of the Order was mailed to the agency representative and to the grievant. The hearing was conducted on May 31 at the facility at which the subject incident occurred. The hearing lasted approximately one hour.

**APPEARANCES**

The agency representative, who was also the sole witness for the agency.

Representative for the grievant.

Grievant.

Both the representative for the grievant and the grievant were sworn witnesses.

The agency introduced four multi-page exhibits.

**ISSUES**

1. Whether the actions of the grievant on November 1, 2005 constituted the use of unreasonable force as prohibited by Agency Policy No. 431-6?
2. Whether the failure by the grievant to report his striking of an inmate on November 1, 2005 constituted a violation of Agency Policy No. 431-11(B)?
3. Whether the actions and omissions of the grievant justified the issuance of a Group II Written Notice on January 27, 2006?

### **BURDEN OF PROOF**

The Agency has the burden of proving the allegations against the grievant by a preponderance of the evidence as provided by Grievance Procedures Manual (hereinafter GPM) Section 5.8, this matter being a grievance involving a disciplinary action.

### **FINDINGS OF FACT**

On November 1, 2005, the grievant was employed by the Department of Corrections at one of its prisons. He was employed as a correctional officer. On that date a number of inmates became disruptive by kicking the cell doors and flooding their individual cells. Cell extractions were performed for several of the inmates. The grievant was the “shield man” on all 11 of the cell entries performed on that date.

A video of one of the cell entries shows the grievant acting in his capacity as the shield man. The grievant is shown on the video to be lying on top of the inmate in a prone position on the floor. The video shows the grievant’s left arm engaged in a pumping or striking motion approximately four times within a span of a few seconds. Because of the camera angle and the position of other correctional officers in the video, it

cannot be determined what, if anything, the grievant was doing with his left arm or whether it was striking the inmate.

Shortly after the incident, the grievant filed an Institutional Report describing the cell entry. The report does not describe anything unusual in the cell extraction with regard to this one inmate or any of the other inmates involved in the disturbance.

An investigation of this incident followed. On January 9, 2006, the grievant gave an interview to an investigator and indicated that he did not remember striking the subject inmate but agreed that the video appears to show that he was striking the inmate. The grievant stated that he did not know why he would have struck the inmate unless necessary to defend himself or to gain control of the situation. At the meeting with the warden of the facility on January 19, 2006, the grievant stated that he did not know whether the inmate was grabbing him, hitting him, biting him, spitting on him or whether his own hand was open or closed. He further stated that he did not know if he was trying to grab the inmate or to push him away. During the course of this investigation, the inmate did not claim to have been seriously injured in the incident.

At the time of the incident, the grievant had been a correctional officer for over five years and that he had received satisfactory annual performance reviews. The agency, in light of the work history of the grievant, issued a single Group II Written Notice for using excessive force and for failing to report the incident. There was no disciplinary action other than the issuance of the Written Notice.

#### **ANALYSIS OF APPLICABLE LAW**

This case arises under the Virginia State Grievance Procedure, Virginia Code Section 2.2-3000, et seq. The Written Notice given to the grievant was made pursuant to Standards of Conduct Policy Number 1.60 of the Department of Personnel and Training. In particular, the grievant has alleged to have violated the Department of Corrections Agency Policy No. 431-6 and Policy No. 431-11(B). Policy 431-6 provides that “employees are permitted to use as much force as they reasonably perceive necessary to perform their duties.” A determination of reasonable force depends upon a review of the circumstances of the incident with the controlling factors being “the degree of force threatened or used by the aggressor . . . the employee’s reasonable perception of the danger . . . any alternatives available to control the situation without the use of force.” Based on the evidence presented, and in applying the controlling standards, I cannot find that the grievant used unreasonable force.

The evidence is completely lacking as to what actions were being taken by the inmate. If he was acting aggressively, then the force used by the grievant may have been reasonable. No officer who was actually present at the time of the cell entry testified. The only evidence presented regarding the event at the cell was the video. One simply cannot determine what the inmate was doing immediately prior to, and during, the time when the grievant is shown raising his arm in a motion which could have been for purposes of striking the inmate, but could also have been for other purposes which would have been legitimate for subduing the inmate.

I believe that the subject policy can only be interpreted to impose on the agency

the burden of proving the use of unreasonable force. It is implicit in the policy that some use of force is often necessary and appropriate. To the extent that the evidence is ambiguous with regard to the actions of the grievant and the inmate, I do not believe that the incident can be used to support, even in part, the disciplinary action taken against the grievant. The agency representative stated “something is going on that can’t be accounted for.” Although he was likely referring to the inability of the grievant to justify his actions, I believe that the initial burden is on the agency to establish what were those actions and that the actions were inappropriate. That has not happened in this case.

The other basis for the disciplinary action is the failure of the grievant to report his actions toward the inmate. It is undisputed that the post-incident report filed by the grievant does not mention any striking or attempted striking of the inmate and is silent as to whether any amount of force was used whatsoever. Throughout the hearing and the grievance process, the agency has stressed as its point of concern lack of awareness by the grievant of his actions as a basis for why the unreasonable force prong of the charge should be sustained. It is inconsistent to complain that the grievant was unaware of what he was doing and then to expect him to have reported what he was doing.

This is one of the rare situations when plausible ignorance can be upheld. Several factors weigh heavily in favor of the grievant in this case. First, the subject incident was only one of eleven cell entries made on that same date. The investigation was not commenced until approximately sixty days after the incident. The number of entries and the passage of time make it understandable that the grievant may not remember why

certain actions were being taken at the time of the incident, even after reviewing the video. The grievant was aware that the entry was being taped and to punish him for failing to mention an incident, of which he may not have been fully aware, while knowing that the video tape may very well reflect all of his actions, implies a certain arrogance or deviousness. I decline to attribute these qualities to the grievant. I believe his demeanor to have been that of a credible witness.

### **DECISION**

For the reasons stated, I hereby rescind the Group II Written Notice issued to the grievant on January 27, 2006.

### **APPEAL RIGHTS**

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or**

**agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14<sup>th</sup> St., 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

**3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. A copy of each appeal must be provided to the other party.

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 EDR or 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 court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code §17.1-405.

DECIDED this June 6, 2006.

Thomas P. Walk, Hearing Officer