

Issue: Group III Written Notice with suspension (striking a ward); Hearing Date: 07/13/06; Decision Issued: 07/14/06; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8378; Outcome: Employee granted partial relief; **Administrative Review**: HO Reconsideration Request received 07/28/06; Reconsideration Decision issued 08/04/06; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request received 07/28/06; EDR Ruling No. 2007-1409 issued 09/15/06; Outcome: Remanded to Hearing Officer; Reopened Hearing Decision issued 12/11/06; Outcome: Original decision affirmed; **Administrative Review**: DHRM Ruling Request received 07/28/06; DHRM Ruling issued - 01/16/07; Outcome: HO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8378

Hearing Date: July 13, 2006
Decision Issued: July 14, 2006

PROCEDURAL HISTORY

On March 23, 2006, Grievant was issued a Group III Written Notice of disciplinary action with ten workday suspension for striking a ward. On March 30, 2006, 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 June 15, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 13, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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. 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 Juvenile Justice employs Grievant as a Juvenile Correctional Officer at one of its Facilities. The purpose of his position is:

To ensure the protection of the citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform.¹

No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On September 25, 2005, wards living in a housing unit at the Facility were agitated; some of the wards having to be restrained. One of the Ward's friends was restrained and this upset him. The Ward was inside his cell with the door locked. Sergeant E approached the Ward's cell door and opened it slightly in order to determine whether the Ward had attempted to tamper with the door lock to prevent it from locking.²

¹ Agency Exhibit 4.

² On a daily basis, Juvenile Correctional Officers check the locks to cell doors to make sure the wards have not placed objects between the locking mechanism and the door to prevent the door from locking even though the door is closed.

The Ward turned his body sideways and began pushing through the door entrance. He was attempting to exit his cell and get into the open area with the Juvenile Correctional Officers. He attempted to get past Sergeant E by ducking under Sergeant E's arms and pushing up against Sergeant E. During this process, the Ward was complaining to Sergeant E about how his friend was being poorly treated. Sergeant E was telling the Ward he should not be concerned about his friend and that he should step back into his cell. As the Ward and Sergeant E argued, the Ward continued to try to get past Sergeant E, but Sergeant E was successful in stopping him. The Ward began to comply with Sergeant E's instructions to move back into his cell. Sergeant E was de-escalating the conflict.

Just as Sergeant E was resolving the matter with the Ward, Grievant thrust his right arm over Sergeant E's left shoulder. Grievant's fist hit the left side of the Ward's face. Grievant was attempting to reach over Sergeant E's shoulder and grab the Ward's arm in order to apply a physical restraint technique approved by the Agency. The Ward perceived Grievant's actions as an attack and became aggressive and combative. At that point, Sergeant E, Grievant, and several other staff had to use physical force to restrain the Ward in his cell. Sergeant E believed Grievant's action endangered him, the other officers, and the Ward by creating a new conflict with the Ward just as one was ending.

The Agency originally issued Grievant a Group III Written Notice with ten workday suspension. During the Step Process, the Superintendent stated that he "offer[ed] to reduce the disciplinary action to a Group II" but the "suspension of 10 days will stand" During a pre-hearing conference, the Agency Advocate stipulated the Agency no longer believed Grievant engaged in a Group III offense, but believed he had acted contrary to written policy.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).³ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to ... comply with established written policy" is a Group II offense.⁴ Institutional Operating Procedure 218-4.1(1) provides:

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ DHRM § 1.60(V)(B)(2)(a).

Physical force is authorized for self-defense, the defense of others, to prevent an escape, to prevent property damage of significant value, to protect a youth from harming himself, and to prevent the commission of a crime. Physical force should be used only when other alternatives have failed or appear unsuitable. When it is deemed necessary to use physical force to control a ward, only the minimal amount of physical force necessary is to be used.⁵

Immediately before Grievant struck the Ward, the Ward was under control. Sergeant E was in the process of convincing the Ward to return to his cell. It was not necessary for Grievant to strike the Ward for self-defense or for the defense of Sergeant E. The Ward was not trying to escape, damage property, harm himself, or commit a crime. Grievant was not authorized by policy to use physical force. When he did so, he acted contrary to written policy thereby justifying the issuance of a Group II Written Notice. A suspension of up to ten workdays is permitted by the Standards of Conduct for a Group II Written Notice and, thus, the Agency suspension must be upheld.

Grievant contends the Ward was not under Sergeant E's control and that is why Grievant attempted to assist Sergeant E by beginning a physical restraint technique taught as part of the Agency's training process. Grievant attempted to grab the Ward's arm but unintentionally hit him on the side of the face. Grievant points out that he has had no history of using excessive force during his service with the Agency and he has an excellent reputation as a Juvenile Corrections Officer.

Grievant's testimony conflicts with the testimony of Sergeant E. Sergeant E testified that he had the Ward under control and was moving the Ward back into his cell when, all of a sudden, an arm came over Sergeant E's left shoulder and a closed fist hit the Ward on the side of the face. Only after the punch was thrown did the Ward become out of control and needed to be restrained.

The Agency's burden of proof in this case is a preponderance of the evidence. The Agency's burden is not to prove its case beyond a reasonable doubt as would be the standard in a criminal matter. In this appeal, the Agency has presented the credible testimony of Sergeant E to support its conclusion that Grievant's use of force was unnecessary. Sergeant E had no motive to testify contrary to Grievant. His testimony was clear, precise, and confident. Sergeant E was the closest person to the Ward. Sergeant E was looking directly at the Ward and speaking to the Ward and assessing the Ward's response. Neither Sergeant E nor Sergeant H⁶ had asked for assistance from any other officers nearby. There is sufficient evidence to believe Sergeant E's

⁵ Agency Exhibit 3.

⁶ Sergeant H was standing behind Sergeant E observing the conflict.

testimony regarding what he observed. Accordingly, the Agency has presented sufficient credible evidence to support its disciplinary action.

Grievant contends the disciplinary action should be mitigated based on his history of refraining from unnecessary use of force and his excellent work history. *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 Employment Dispute Resolution...”⁷ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” 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 is **reduced** to a Group II Written Notice with a ten work day suspension.

APPEAL RIGHTS

You may file an administrative review request within **15 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.
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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor

⁷ *Va. Code § 2.2-3005.*

Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8378-R

Reconsideration Decision Issued: August 4, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant contends he was not given adequate notice of the rule that he was accused of violating. The Written Notice stated, “you struck a ward.”⁹ During the Second Resolution Step of the grievance process, the Superintendent wrote, “[t]here is a lack of sufficient evidence to support that [Grievant] intentionally struck the ward in the face *** Therefore, I am willing to reduce the Group III to a Group II, for failure to follow proper procedure and established written policy (Section V.B.2.a of the Standards of Conduct). The suspension of 10 days will stand, as [Grievant’s] actions had serious consequences, that could have potentially endangered the safety and welfare of the JCO’s and ward and created potential injury to all those involved.”

Several days prior to the hearing, the Agency provided Grievant with copies of the policies upon which it intended to show that he failed to comply with written policy. Also included in the document exchange was a copy of the investigator’s report providing details of the witnesses questioned by the investigator. The Agency’s primary witness was Sergeant E. Sergeant E’s testimony during the hearing was similar to the statements he made to the investigator.

Whether Grievant had adequate procedural due process can be measured on the level of surprise he faced at the hearing.¹⁰ The Agency’s documents presented to

⁹ Agency Exhibit 1.

¹⁰ The *Rules for Conducting Grievance Hearings* state:

Grievant prior to the hearing clearly showed the facts upon which the Agency believed Grievant should be disciplined. In particular, the Agency believed Grievant hit the Ward and that Sergeant E believed there was no need for the hit because Sergeant E had the Ward under control. Institutional Operating Procedure 218-4.1 identifies when physical force is appropriate. Although Grievant may not have intended to punch the Ward, he did intend to use physical force in an attempt to restrain the Ward.¹¹ His use of force was not authorized by written policy thereby justifying the issuance of a Group II Written Notice with suspension.

Grievant now contends he was not given a fair opportunity to present his defense. He contends (but does not identify) that he would have presented additional documents to support his position. He contends he would have presented additional testimony to show that the situation was under control and he would have requested a video tape of the incident. He contends he also would have brought into question that Sergeant E did not follow established policy when he opened the Ward's door.

The time for Grievant to raise these objections was prior to the close of the hearing. Had Grievant done so, the Hearing Officer could have left the record open for the production of additional evidence. Grievant made no such request. Grievant could have requested and presented a copy of the video tape regardless of the Agency's theory of its case.¹² When the video was discussed during the hearing, the Agency Party represented that the video tape was a series of still images and not a continuous motion picture. Grievant could have asked at that time that the video be produced. He did not do so. Grievant questioned Sergeant E about whether the situation was under control and presented testimony of other witnesses who testified they believed the situation was under control. It is unclear what additional testimony Grievant could have presented to show that the situation was not under control. Grievant questioned Sergeant E about his judgement of opening the Ward's door at the specific time he did so rather than waiting until tensions within the housing unit had calmed. Whether Sergeant E exercised poor judgment in opening the Ward's door does not excuse Grievant's failure to comply with policy.

The Hearing Officer finds that Grievant was given adequate notice of the facts and policy upon which the Agency used to take disciplinary action. Grievant knew when he entered the hearing that the Agency intended to present evidence of a Group II offense for failure to follow policy. Because Grievant was given adequate notice of the charges against him, he was able to present adequately his defense to those charges.

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

¹¹ Grievant stated he hit the Ward but contends it was unintentional.

¹² In other words, Grievant could have used the video to show he did not strike the Ward intentionally.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

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 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 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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8378-R2

Reconsideration Decision Issued: December 11, 2006

SECOND RECONSIDERATION DECISION

In accordance with EDR Ruling 2007-1409, the original hearing was reopened to permit Grievant to present additional evidence in accordance with the ruling. During the reopened hearing, Grievant presented additional testimony and documents to support his position.

The evidence presented by Grievant is not sufficient to contradict the credible testimony of Sergeant E. Sergeant E was in control of the Ward. He was looking at the Ward, talking to the Ward, and backing the Ward into the cell. Sergeant E was attempting to deescalate the disruption and permit the Ward time to calm down. Sergeant E did not ask for assistance from anyone else because he did not need assistance.

Grievant argues the Ward kept trying to duck underneath Sergeant E's arms to escape. Grievant testified that the Ward was approximately 5'6" and of medium build. Grievant testified Sergeant W was approximately 6' and weighted 220lbs or 240lbs. Although the Ward was trying to get past Sergeant W, their relative sizes supports Sergeant E's conclusion that he was in control of the Ward. The Ward was not able to get past Sergeant E at the time Grievant hit the Ward. Grievant had to reach over Sergeant E to reach the Ward. This also supports the conclusion that Sergeant E had the Ward under control.

Grievant argues because a 10-33 (a call for immediate help) was called, Grievant was entitled to use force. Nothing in policy supports this conclusion. In addition, it appears the 10-33 was called after Grievant hit the Ward and because the Ward became unruly as a result of the hit.

After considering all of the evidence presented during the original and reopened hearings, it is clear that Sergeant E had the Ward under adequate control and that Grievant's assistance was not necessary. Grievant was not authorized by policy to use physical force. By doing so, he acted contrary to policy thereby justifying the issuance to him of a Written Notice.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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 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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Juvenile Justice
January 16, 2007

The grievant has appealed the hearing officer's July 14, 2006, decision in Case No. 8378. The grievant is contesting the hearing officer's decision because he contends that the hearing officer did not take into full consideration what the issues were as they related to his grievance. The agency head of DHRM has requested that I respond to this appeal.

FACTS

The Department of Juvenile Justice employs the grievant as a Juvenile Corrections Officer at one of its facilities. On September 25, 2005, wards in one of the housing units became unruly and some of them had to be restrained. One of the wards took exception to how one of his friends was being treated, and eventually tried to exit his cell when another employee was doing a lock check. In his attempt to assist the other employee to control the ward, grievant's fist apparently struck the ward's face and caused him to go out of control. After an investigation was conducted, the grievant was issued a Group III Written Notice with a ten day suspension. The grievant filed a grievance and during the management steps of the grievance procedure, the disciplinary action was reduced to a Group II Written notice with a ten day suspension.

The grievant was not satisfied with the outcome, so he advanced his grievance to the hearing step. In his decision dated July 14, 2006, the hearing officer upheld the agency's disciplinary action. The grievant filed a request for a Reconsideration review and for an administrative review from the Department of Employment Dispute Resolution. In his reconsideration decision, the hearing officer affirmed his original position. In a decision by the Department of Employment Dispute, the case was remanded to the hearing officer to be reopened. In a second Reconsideration decision dated December 11, 2006, the hearing officer affirmed, again, his original decision

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the Department of Human Resource Management has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision

to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the grievant has not identified any particular mandate or provision in policy with which the hearing officer's decision is inconsistent. Rather, it appears that the grievant simply disagrees with the hearing officer's decision. Therefore, DHRM has no basis to interfere with the application of the hearing officer's decision.

Ernest G. Spratley, Manager
Employment Equity Services