

Issues: Group III Written Notice (Inmate Abuse), Suspension, Demotion, and Pay Reduction; Hearing Date: 07/18/09; Decision Issued: 07/27/09; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9129; Outcome: Full Relief;

Administrative Review: AHO Reconsideration Request received 08/10/09;

Reconsideration Decision issued 08/25/09; Outcome: Original decision affirmed;

Administrative Review: EDR Ruling Request received 08/10/09; EDR Ruling #2010-2395 issued 10/19/09; Outcome: AHO's decision affirmed;

Administrative Review: DHRM Ruling Request received 08/10/09; DHRM Ruling issued 11/10/09; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9129

Hearing Date: July 18, 2009
Decision Issued: July 27, 2009

PROCEDURAL HISTORY

On February 27, 2009, Grievant was issued a Group III Written Notice of disciplinary action, with demotion, reduction in pay, and 30 days suspension. The offense was established by the investigative report from the special investigations unit: assault and battery, misfeasance in office, disruptive behavior, excessive force, and violation of rules of conduct, all pertaining to an incident with an inmate on March 19, 2008.

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 30, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on July 2, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, Saturday, July 18, 2009. The grievance hearing was held on July 18, 2009, at the Agency's regional facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant also submitted documents that were admitted, some over objection by the Agency that pertained to the inmate in question. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Advocate for Grievant
Representative of Agency
Advocate for Agency
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?

The Grievant requests rescission of the Group III Written Notice and restoration of rank and pay.

BURDEN OF PROOF

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, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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 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.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include acts of physical violence or fighting; physical abuse or other abuse, either verbal or mental, which constitutes recognized maltreatment of offenders; and, violations of DOC Operating Procedure 130.1. Agency Exh. 2.

The Agency's Operating Procedure No. 130.1, Rules of Conduct Governing Employee Relationships with Offenders, provides guidance to prevent the corporal abuse of offenders. Abuse is defined as

[t]he improper use or treatment of an individual that directly or indirectly affects an individual negatively. Any intentional act that causes physical, mental, or emotional injury to an individual.

Agency Exh. 6. The same procedure states that offenders shall be treated humanely. "Abuse or any form of corporal punishment or hazing is prohibited. No profane, demeaning, indecent, or insulting language, or words with racial or ethnic connotations, shall be directed toward such persons."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a sergeant who had 22 years of service with no active disciplinary actions. The Agency agreed that the Grievant's history of annual evaluations through the years showed that he either met or exceeded expectations.

The Agency's representative, the facility warden, testified that from an Agency internal investigation she learned of founded charges against the Grievant, including assault and battery of an inmate and violation of Agency policy for humane treatment of offenders. The Agency's investigation report was admitted as Agency's Exh. 5, and the lead investigator testified at the grievance hearing. The complaining inmate, W, and other inmates interviewed were not presented as witnesses at the grievance hearing.

The internal investigation was initiated after inmate W wrote complaint letters to the Agency and other outside officials, alleging that he was assaulted by the Grievant, while another sergeant ("E") stood by without intervening. W was not called to testify at this grievance hearing. W's complaints are established through his written letters and interviews. W said that the Grievant and E removed him from his second floor cell with instructions to escort him to the medical unit for a scheduled appointment. W asserted that the Grievant, after putting W in hand and leg restraints, became aggressive with W and, when W questioned the Grievant about the forcefulness, the Grievant refused to take W to his medical appointment. W asserts that the Grievant then aggressively and forcefully lead W back up the stairs and forcefully threw W back

into his cell. W said because his hands and ankles were still secured in metal restraints (hands behind his back), he lost his balance and fell forward, causing a bruise under his left eye and scrapes on the back of his ankles from being rushed up the stairs with the leg restraints still on. Agency's Exh. 16 (pictures). According to W, the Grievant refused to escort him to his medical appointment.

The inmate W's grievance (complaint) against the Grievant (Agency Exh. 5, p. 126) states that it was written by W while his hands were restrained behind his back. None of the witnesses explained how W could have written his complaint while his hands were restrained behind his back. The handwriting does not appear unbalanced or irregular, but rather neat and comparable to W's other handwriting examples. W refused to have his hand restraints removed when he was returned to his cell, and he complained that he was forced to eat lunch with his hands bound behind him.

The Grievant, sergeant E who was with him at the time, and other witnesses testified that the inmate did not have the leg restraints on when he was being escorted up the steps back to his cell. The Grievant testified that W was noncompliant with repeated efforts to apply the required leg restraints so that W could be escorted to his scheduled medical appointment. The Grievant considered W's conduct tantamount to refusal of the escort to the medical unit, and, thus, he returned W to his cell without the leg restraints on. The Grievant agreed that W refused to have his hand cuffs removed. The Grievant denied that he assaulted or battered W, and insisted that the leg restraints were never applied to W because of his noncompliant behavior that prevented the orderly application of the leg restraints. It was for this reason, according to the Grievant, that he considered W as refusing his medical appointment. Sergeant E testified similarly, but said he would have been more tolerant of W's noncompliance and would have further tried to coax W into compliance.

The Agency's nurse examined W on the evening following the incident and noted an open area to left and right Achilles and left eye slightly discolored. Agency Exh. 13. The nurse examined the Agency's photographs taken on April 8, 2008, (Agency Exh. 16) and testified that her observation was of a less noticeable injury under W's left eye than shown in the photograph.

The control booth officer and floor officer at the time observed the parties at the time and did not recall seeing anything unusual about the way the Grievant handled or escorted W from and back to his cell.

The Agency's lead investigator concluded that Grievant's history of the events varied from the time of the incident in March 2008 and when he was interviewed in December 2008. The Grievant testified that he asked for a copy of his March incident report when interviewed in December, but his request was refused. The Grievant testified that his memory of specific details of the incident had faded during the nine months from March to December.

In reaching his conclusions, the Agency's chief investigator was unaware of and did not consider W's disciplinary record while incarcerated. W's record shows that he has had multiple disciplinary incidents, including disobeying direct orders, fighting, and assaults, with one instance of assault on March 14, 2008 (a few days before this incident). Agency Exh. 17. The

credibility of W is necessarily a central aspect of the Agency's case, as W was the only witness who could establish his slight injuries were inflicted by the Grievant.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant and witnesses supporting his version of events to be credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of the witnesses; they cannot be cross-examined, nor their recollections probed. While the Agency may point to certain corroborating information to support its conclusions, there are just as many inconsistencies. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other.

It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions her agency presented to her. The Agency also showed appropriate mitigation in levying the discipline. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony, and that of supporting witnesses, to be at least as credible as the contrary information and conclusions charged by the internal investigation. Necessarily, the escorting of an inmate by a corrections officer is the use of force, and the evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy. For this reason, I find that the Agency's case rises no higher than equipoise and does not meet its burden of establishing the charged misconduct.

DECISION

For the reasons stated herein, accordingly, the Agency's discipline of the Group III written notice and associated sanctions are **reversed**. The Grievant's rank, benefits, and back pay shall be restored.

APPEAL RIGHTS

As the Grievance 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** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 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, Main Street Centre, 600 East Main Street, Suite 301, 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**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). 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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In the matter of: Case No. 9129

Hearing Date: July 18, 2009
Decision Issued: July 27, 2009
Reconsideration Decision Issued: Aug. 25, 2009

RECONSIDERATION DECISION

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, (effective August 30, 2004) provides, “A hearing officer’s original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, 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. Requests may be initiated by electronic means such as a facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director.”

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 conclusion is the basis for such a request. § 7.2(a)(1), Grievance Procedure Manual.

On August 10, 2009, the Agency’s request for reconsideration was received timely by facsimile. The Agency has raised six numbered points of error, some arguing errors of fact and others arguing errors of policy.

1. The Agency argues that the hearing officer erroneously placed emphasis on the issue of how the complaining inmate could have written his complaint while his hands were cuffed behind his back. The hearing officer considered the testimony of how the claimant could have stepped through his cuffs, but the testimony on this issue was speculative. The hearing officer considered the issue of the inmate’s written statement—that he wrote the complaint with his hands cuffed behind his back—as an unanswered credibility question for the complaining inmate. The hearing officer did not find that the inmate’s hands were not cuffed when returned to his cell.

2. The Agency takes issue with the hearing officer's reference to the exact timing of the nurse's examination versus the photographs taken nearly three weeks later. The Agency misstates the hearing officer's finding. The hearing officer found that the Agency's nurse examined the inmate on the evening following the incident (not the next day as the Agency reads the decision) and noted an open area to left and right Achilles and left eye slightly discolored. The nurse did not recall the extent of the injuries as depicted in the photographs, but she described the injury as slight. The existence of abrasions or bruising does not force a conclusion as to how the injuries occurred, and the three week lapse between the alleged event and the photographs is not conclusive.

3. The Agency argues that the hearing officer misconstrued the control booth officer's and floor officer's testimony. The hearing officer found that their observations were corroborative of neither versions of the events. The Agency argues both that officers were very busy at the time and did not pay close attention to the alleged incident and that the officers did not see the inmate behave disruptively. However, the hearing officer finds that these officers' testimony does not corroborate the inmate's version.

4. The Agency argues that the hearing officer inappropriately considered the inmate's disciplinary record while incarcerated. The hearing officer only considered the disciplinary record to show that the history of offenses documented by the Agency. The inmate was not produced as a witness, and the hearing officer may not simply accept the internal investigation conclusions for the truth. The hearing officer is charged with conducting a *de novo* hearing and deciding the grievance based on the evidence presented at the hearing. Hearsay and unsworn evidence does not carry the same weight as sworn testimony presented by witnesses subject to cross-examination and demeanor evaluation. Certainly, the eye-witness accounts of all the witnesses from both sides vary, and the best the Agency presented was a state of equipoise.

5. The Agency argues that the hearing officer made an incorrect determination of the credibility of witnesses. While the hearing officer appreciates the Agency's view, it is the hearing officer's obligation to make an independent assessment of the evidence and credibility of the witnesses based on a *de novo* hearing.

6. The Agency asserts that it is not standard policy to present inmate witnesses at grievance hearings, and that it will make the inmate available for testimony if the hearing officer wishes to hear personally from the complaining inmate or other inmate witnesses. The hearing officer accepts this as a motion to reopen the hearing for presentation of new evidence. However, there is no showing that the Agency has met the requirement of presenting additional evidence. To establish that evidence is "newly discovered," the moving party must show

(1) the evidence was first discovered after the hearing; (2) due diligence on the moving party's part to discover the new evidence had been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were reheard, or is such that would require the hearing decision to be amended.

See Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (citing *Taylor v. Texgas Corp.*, 831 F. 2d 255, 259 (11th Cir. 1987)). *See also* EDR Ruling No. 2007-1490 which adopted the *Texgas* standard.

Finally, the Agency presents a position in advance of its role as guardian of the safety of inmates and arguing that the hearing officer's decision contravenes that paramount mission. The hearing officer accepts, recognizes and upholds the Agency's important role in guarding the safety of the inmates and the valid public policies promoted by the Agency. However, the hearing officer conducts a *de novo* hearing, and the hearing officer must weigh the evidence presented and make an independent finding and decision.

The Agency has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for its request for reconsideration. The issues raised by the Agency were considered and decided in the original decision, and the hearing officer, after conducting a *de novo* hearing, found the Agency did not meet its burden of proving the offense by a preponderance of the evidence. For this reason and the rationale expressed in the underlying decision, the hearing officer hereby denies the Agency's request for reconsideration and hereby affirms his decision that the Agency has failed to meet its burden of proving by a preponderance of the evidence that the discipline was warranted and appropriate.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

November 10, 2009

Employee Relations Manager
Department of Corrections
Richmond, VA 23261

RE: **Grievant v. Department of Corrections**
Case No. 9129

Dear Manager:

The Agency head, Ms. Sara Wilson, has asked that I respond to the Department of Corrections' (DOC) request to conduct an administrative review of the hearing officer's decision in the above referenced case. Please note that a party to the grievance may file an administrative review request within 15 calendar days from the date the decision was issued if any of the following applies:

1. A request to reconsider a decision or to reopen a hearing is made to the hearing officer. This request must state the basis for such request. This request must be based on new evidence that could not have been discovered before the hearing, or if it is believed the decision contains an incorrect legal conclusion.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resource Management. The challenge must include the specific policy and an explanation of why it is believed the decision is inconsistent with that policy.
3. A challenge that the hearing decision does not comply with the grievance procedure is made to the Director of the Department of Employment Dispute Resolution. The challenge must state the specific portion of the grievance procedure with which it is believed the decision does not comply.

Our records show that the DOC fully met the requirement of filing its request for an administrative review in a timely manner. The agency indicated that it submitted this request because even though the hearing officer attempted to understand the evidence before him, his unfamiliarity with correctional institution operations and procedures resulted in a ruling that was inconsistent with the mission of the Agency as well as with several Agency policies, including

DOC Operating Procedure 130.1, *Rules of Conduct Governing Employees Relationships with Offenders*; DOC Operating Procedure 420-2, *Use of Restraints and Management of Offender Behavior*; and DOC Operating Procedure 135.1, *Standards of Conduct*.

While the agency indicated the hearing decision is inconsistent with the above listed policies, we have determined that the agency's challenge is based on the weight and credibility that the hearing officer accorded the testimony of witnesses at the hearing, the resulting inferences he drew, and the conclusion at which he arrived. This Agency has the authority to review only the interpretation and application of policy but has no authority to address the issues DOC raised. We must therefore respectfully decline to honor the agency's request to conduct an administrative review.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services