

Issues: Group III Written Notice (excessive use of force), Group III Written Notice (inmate abuse) and Termination; Hearing Date: 03/18/11; Decision Issued: 03/21/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9528; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 04/04/11; Reconsideration Decision issued 04/06/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 04/04/11; EDR Ruling No. 2011-2947 issued 05/17/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 04/04/11; DHRM form letter issued 04/19/11; Outcome: Declined to review.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9528**

Hearing Date: March 18, 2011  
Decision Issued: March 21, 2011

**PROCEDURAL HISTORY**

On October 18, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating the Agency's Use of Force policy. On October 18, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for a decision of Founded made as part of a local Child Protected Services investigation.

On November 15, 2010, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 23, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant Representative  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 employed Grievant as a Senior Juvenile Correctional Officer at one of its Facilities. He began working for the Agency on October 22, 2003. Grievant had prior active disciplinary action. On February 11, 2010, Grievant received a Group II Written Notice of disciplinary action for failure to report to work as scheduled without proper notice. On July 12, 2010, Grievant received a Group II Written Notice of disciplinary action for using obscene or abusive language. On July 29, 2010, Grievant received a Group II Written Notice for failing to confiscate a controlled item.

The Facility provides a military style environment for juvenile residents. When leaving one building and walking to another building, a group of residents will walk in formation and be escorted by Juvenile Correctional Officers.

Grievant received training regarding use of force with residents and how to implement the Primary Restraint Technique. The Primary Restraint Technique involved getting behind a resident and clasping the resident's arms in a manner that would prohibit the resident from moving.

On August 8, 2010, Grievant and Officer H escorted a group of residents as they walked from one building to another inside the Facility. Resident K began to “horseplay” with Resident L by hitting Resident L. Grievant announced on the radio that “he had a resident hitting another resident”. With an open hand, Grievant hit Resident K in the back of the head. Officer H instructed Grievant to stop what he was doing. The formation continued walking. Resident K continued to argue with Resident L. Officer H instructed Resident K to stop what he was doing. Grievant then grabbed Resident K by the back of the neck and held him for approximately 10 seconds. After Grievant let go of Resident K’s neck, Resident K turned around and punched Grievant in the face with his fist. Grievant was startled by the attack and responded by punching Resident K in the face. Grievant and Resident K continued to hit each other until Grievant was able to use the Primary Restraint Technique to force Resident K to the ground.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

#### Group III Written Notice -- Use of Force.

Institutional Operating Procedure number 218 governs the Use of Physical Force. The purpose of the policy is to “establish uniform standards governing the use of physical force in controlling wards.” Section 218 – 4.1 provides:

Maintaining custody, control and security of wards and the appropriate use of force when necessary is essential to the operation of [the Facility]. The Behavior Management Program can function effectively only when institutional security and orderly control of wards can be maintained. Generally, the use of force is permissible when other lesser alternatives do not reasonably appear sufficient.

Physical force is authorized for self defense, the defense of others, to prevent an escape, to prevent property damage, 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.

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant failed to comply with the Facility's Use of Force policy. Grievant hit Resident K in the back of the head. Grievant did not do so for self-defense, the defense of others, to prevent an escape, to prevent property damage, to protect a youth from harming himself, or to prevent the commission of a crime. No credible evidence was presented to show the Grievant attempted "other alternatives" to control Resident K and those alternatives failed or were unsuitable. After the formation walked a short distance farther, Grievant grabbed the back of Resident K's neck and held him for approximately 10 seconds. Once Grievant let go of Resident K, Resident K punched Grievant and Grievant punched Resident K as well. Grievant failed to comply with the Facility's Use of Force policy when Grievant grabbed the back of Resident K's neck and held him. Grievant also failed to comply with the policy when Grievant punched<sup>2</sup> Resident K in response to Resident K assault. Grievant had received training regarding use of the Primary Restraint Technique. Punching a resident was not a technique authorized by the Agency's Use of Force Training.

Group III offenses include actions that "endanger others in the workplace." Grievant's failure to comply with the Agency's Use of Force policy endangered Resident K and endangered Grievant because his actions increased the risk that Resident K would retaliate against Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for unauthorized use of force. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant contends that Officer H was untruthful in her description of his behavior. The Hearing Officer closely observed the demeanor of Officer H as she testified. Her testimony was credible. There exists a sufficient factual basis to support the Agency's issuance of the disciplinary action against Grievant.

*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..."<sup>3</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

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<sup>2</sup> Grievant denied that he punched Resident K. Thus, Grievant did not argue that it was necessary for him to punch Resident K as a form of self defense.

<sup>3</sup> *Va. Code § 2.2-3005.*

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.

### Group III Written Notice – Founded Case of Physical Abuse

Grievant's behavior was investigated by the local Child Protective Services Department who concluded that Grievant engaged in physical abuse of Resident K. Grievant was notified of the findings but he failed to appeal the decision of the local Child Protective Services Department.

The Agency issued Grievant a Group III Written Notice for having the status of a founded complaint by the local Child Protective Services Department. If the Hearing Officer assumes for the sake of argument that having the status of a founded complaint by a local Child Protective Services Department constitutes a Group III offense, insufficient evidence was presented to show that Grievant had adequate notice that having that status would be a group offense and that the level of the offense would be sufficient to support his removal. Accordingly, mitigating circumstances exist to support reversal of the Group III Written Notice for having a founded case of physical abuse.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for unauthorized use of force with removal is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for having a founded case of physical abuse is **reversed**.

### **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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
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  
600 East Main St. STE 301  
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.<sup>4</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>4</sup> 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: 9528-R**

Reconsideration Decision Issued: April 5, 2011

**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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has 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 retried, or is such that would require the Hearing Decision to be amended.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. The requesting party simply restates the arguments and evidence presented at the hearing. For this reason, the 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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

April 19, 2011

RE: **Grievance of [Grievant] v. Department of Juvenile Justice**  
**Case No. 9528**

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has directed that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following applies:

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 (DHRM) to review the decision. You must refer to 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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, while you identified [facility] IOP 218 as being applicable to your case, you have not explained how the hearing decision is inconsistent with the provisions of that directive. Rather, it appears that you are disagreeing with what evidence the hearing officer considered, how he assessed that evidence and the conclusions he drew based on the assessment of that evidence. We have no bases for interfering with the application of this decision; therefore, we must respectfully decline to honor your request.

Sincerely,

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