



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11429

Hearing Date: December 10, 2019

Decision Issued: February 12, 2020

PROCEDURAL HISTORY

On September 10, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for assaulting a resident during a physical restraint.¹

On September 26, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 7, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 10, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

¹ The Written Notice states, "[r]estraining the resident was warranted, but the restraint turned into excessive force"

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?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Resident Specialist. He had been employed by the Agency for approximately 6 years. Grievant was 51 years old. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and Ms. R were working in the Unit on June 26, 2019. The Resident was also in the Unit that day.

The Unit has an open area surrounded by doorways. Most of the doorways opened into a resident's room. One of the doorways opened into the shower room.

The Unit had video cameras showing activity in the open area but not inside the shower room. The cameras were hung on the wall or ceiling with a wide angle view. The cameras did not record continuous motion.

On June 26, 2019, the Resident went to the middle of the open area and sat down at a table. Grievant and Ms. R asked the Resident several times to return to his room. He refused to return to his room. When a resident refused to comply with an employee's instruction, staff were to remove items from the resident's room to "sanitize" the room.

Grievant placed his right foot on a chair to adjust his shoe and shoe laces. Ms. R began removing items from the Resident's room. The Resident went to the doorway between the open area and the shower room. He stood in the doorway facing the open area. Grievant moved close to the Resident and stood facing the Resident talking to him. Grievant moved away from the Resident as the Resident remained in the shower room doorway. Grievant returned to the chair and placed his left foot on the chair to adjust the laces on his left shoe. He continued to talk to the Resident. Ms. R continued to remove items from the Resident's room. Some of the Resident's belongings were in a pile in front of the open door to his room. Grievant moved those items with his foot toward the center of the open room.

The open door to the Resident's room was to the Resident's left as he stood in the shower room doorway. The door was a heavy metal door that when closed could be locked to prevent the Resident from leaving the room. As Ms. R was exiting the Resident's room, the Resident used his left arm to grab the door edge and swing it in order to close the door. The Resident's objective was to close Ms. R inside the room. The door hit Ms. R on her left elbow causing her pain. Grievant observed the door hit Ms. R. Grievant and Ms. R moved quickly in the direction of the Resident. Their objective was to restrain the Resident.

The Resident moved backwards into the shower room as Grievant and Ms. R moved towards him. The Resident punched Ms. R in the forehead. The floor in the shower room was wet. Ms. R fell to the floor. The Resident fell to his back but his left leg was on top of Ms. R. Ms. R was on her left side facing away from the Resident. The Resident's left leg was on top of Ms. R's right side. Ms. R attempted to get out from under the Resident as the Resident continued to kick and punch toward Grievant and Ms. R. Grievant remained standing but jumped back and forth to avoid being kicked by the Resident. The Resident was able to kick Grievant several times. He bent over to attempt to turn the Resident so that the Resident could be restrained.

At some point, Ms. R was able to use her right hand to grab her radio and announce an emergency. This signaled numerous staff to come to the Unit to help.

A supervisor, Ms. A, was the first to enter the shower room. She observed Grievant to her left, the Resident in front of her and Ms. R to her left. The Resident was on his back trying to kick Grievant and Ms. R. The Resident was saying "Get off of me." Grievant was trying to get the Resident to turn over so that the Resident could be restrained. Ms. A did not observe Grievant kicking the Resident. She did not observe Ms. R kicking the Resident. Ms. R said, "He hit me!" Ms. A turned her focus to Ms. R. Ms. A observed Ms. R as "elevated" and "agitated." Ms. R was furious and cursing. Ms.

A told Ms. R, "You need to leave and get out." Ms. A instructed another staff member to remove Ms. R from the shower area. Mr. C "picked [Ms. R] off the floor and escorted her off of the unit." He did so "to get her away from the incident."² Another employee assisted Mr. C. Ms. R was "crying profusely" as she left the Unit.

Ms. R went to the emergency room after the incident. Her leg was injured where the Resident fell on her leg.

A medical examination of the Resident showed he had a scratch on the left side of his neck and "pectoral area."

The Resident told staff that Grievant kicked him. The Agency assigned the Investigator to review the Resident's allegation.

The Investigator viewed a video of the incident. He believed Grievant had kicked the Resident. His interview questioning appeared directed at confirming his belief.³

The Investigator interviewed Grievant on July 7, 2019⁴ and on July 11, 2019. The Investigator asked: What was happening? What was going on? Grievant replied, "[t]oday I don't recall exactly what was happening. But based on the marks on my legs I was trying to prevent him from bruising my legs any further since he was doing a lot of kicking."

On July 11, 2019, the Investigator interviewed Grievant for the third time. The Investigator asked, "Did you punch [the Resident] more than five times or less than five times? Grievant replied, "I didn't punch [the Resident] at all. The Investigator asked, "Did you kick [the Resident] more than five times or less than five times? Grievant replied, "I didn't kick [the Resident] at all."

On July 11, 2019, the Investigator interviewed Ms. R. Ms. R described the incident. The Investigator asked, "But I didn't hear what you did. I need to hear what you did. Did you throw any punches? Ms. R replied, "No. *** I'm trying to push him off but he [was] steady kicking. *** I don't know what he was thinking but I never kicked him. I never kicked him. He might have felt like I was kicking because I was trying to push him off of me. But I never kicked him."

The Investigator asked, "Did you ever punch him? Ms. R answered, "I don't recall." The Investigator said, "At the end of the day, I am not trying to get you to say

² Agency Exhibit F.

³ The Investigator's approach appeared to be one designed to have Grievant and Ms. R confess to kicking the Resident. Many of his questions were leading and presumed Grievant and Ms. R had kicked and/or punched the Resident.

⁴ The Agency only presented a recording of the second half of the interview with Grievant on July 7, 2019. This portion occurred after Grievant had viewed the Rapid Eye video.

something you didn't do. But at the same time, this is not a time to pretend nothing happened if you did something." The Investigator added, "Let me ask you one more time then we will just go through the video. Could you have hit him? Ms. R said, "I, probably, yes."

The Investigator asked, "Would you say you struck him more than five or less than five time?" Ms. R answered, "Probably about five." The Investigator asked, "Would you say you kicked him more than five times or less than five times?" Ms. R answered, "Less than five times."

The Investigator as asked, "Your partner [Grievant] what [is] he doing? Ms. R asked, "Is that him standing there?" The Investigator said yes. Ms. R said, "Yes. I see him but I can't tell what he [is] doing." The Investigator asked, "What [does] it look like to you? What [does] it look like?" Ms. R answered, "To me it [looks] like, to be honest it [looks] like he doing like I don't know, like I don't know it's like he ..." The Investigator interrupted Ms. R and said, "kicking or stomping, kicking or stomping!"⁵

The Investigator asked, "How many times would you say with [Grievant], punched, more than five or less than five?" Ms. R said, "Oh, I don't even know. I don't even want to guess, because I don't even know." The Investigator insisted, "Are you saying more than five or less than five?" Ms. R answered, "I would say probably more than five, maybe about six." The Investigator asked, "Now with kicks, how many times would you say [Grievant] kicked, more than five or less than five? Ms. R replied, "If I had to guess, I don't even want to guess because I don't want to be wrong, I don't want to lie to you. If I had to guess, I would say, I don't know." The Investigator said, "If you think he kicked less than five say less than five; if you think more than five say more than five; five is the number that I use." Ms. R said, "I would say less."

CONCLUSIONS OF POLICY

Grievant was disciplined for kicking and punching that occurred in the shower room. The Agency relied on two primary sources to conclude that Grievant should be disciplined – a video of the incident and Ms. R's statements to the Investigator.

The video is not sufficient to determine whether Grievant and Ms. R engaged in any improper behavior. After the group entered the shower room, the video does not show Ms. R or the Resident. The video does not show whether Ms. R punched and/or kicked the Resident. The video shows Ms. R being escorted from the shower room because she was angry and upset. Being angry and upset does not mean Ms. R kicked or punched the Resident.

⁵ By interrupting Ms. R and telling her how to answer the question, the Investigator showed his presumption regarding Grievant's behavior.

The video does not show Grievant kicking or punching the Resident. The video camera angle is from a distance and is of poor quality without continuous motion. The video shows only a limited portion of Grievant's body when he is in the shower room. It does not show Grievant's feet. The video does not show Grievant kicking the Resident. The video shows Grievant's body moving up and down quickly. The video shows Grievant's body moving towards and away from the Resident.

The Investigator concluded the video showed Grievant "kicking and stomping" but the video does not confirm this conclusion.

Many of the Investigator's question presupposed that Grievant and Ms. R had kicked and punched the Resident. The Investigator repeatedly asked how many times did Grievant and Ms. R kick or punch the Resident. He essentially induced the response that matched his assumption regarding what happened.

Grievant testified he was trying to avoid being kicked by the Resident and trying to move the Resident's body so that the Resident could be restrained. The video is consistent with Grievant's assertions. It is possible that Grievant was "kicking and stomping" the Resident, but it is also possible that Grievant was moving up and down and back and forth to avoid being kicked by an angry Resident while attempting to restrain the Resident. The Agency's use of the video is not sufficient to support its burden of proving Grievant kicked and/or hit the Resident.

The Investigator interviewed Grievant. Grievant conceded that the video could suggest that Grievant was kicking the Resident, but Grievant never said he kicked or punched the Resident. Indeed, Grievant repeatedly denied kicking or punching the Resident.

The Investigator interviewed Ms. R. Ms. R first told the Investigator she never kicked the Resident and she did not recall punching him. When asked if she could have hit the Resident, Ms. R said yes. Ms. R admitted to striking the Resident about five times. She admitted to kicking the Resident fewer than five times. The evidence is sufficient to conclude that Ms. R punched and kicked the Resident.

The Investigator asked Ms. R about Grievant's behavior. He showed her the video and asked her what Grievant was doing. As Ms. R began to explain that she did not know, the Investigator interrupted her to tell her that Grievant was "kicking and stomping." The Investigator then asked Ms. R if Grievant punched the Resident more or less than five times. Ms. R said she did not know, she did not want to guess. After the Investigator asked again, Ms. R said it was probably more than five, maybe six times. The Investigator then asked Ms. R if Grievant kicked the Resident more than five or less than five times. Ms. R said she did not know and did not want to guess but the Investigator asked again. Ms. R then said it was less than five times.

Ms. R's statements to the Investigator are not sufficient to support the disciplinary action against Grievant. The Resident's leg was on top of Ms. R's body. She was faced

away from Grievant. She was focused on getting the Resident's leg off of her and not on Grievant's actions. She was so angry and upset that she could not remember some portions of the incident. Ms. R's ambivalent statements to the Investigator along with her inability to view Grievant's actions renders unreliable the Investigator's and the Agency's conclusion that Grievant hit and/or kicked the Resident.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11429-R

Reconsideration Decision Issued: April 2, 2020

RECONSIDERATION DECISION

On March 17, 2020, the Office of Employment Dispute Resolution issued Ruling 2020-5061 remanding this matter to the Hearing Officer. The Ruling provided, in part:

The agency contends that, while the hearing officer did not find sufficient evidence to support the most serious misconduct charged by the Group III Written Notice, he failed to consider whether the evidence supported other charged misconduct. Specifically, the agency argues that the Written Notice effectively charges unsatisfactory performance and failure to follow policy by citing requirements to use “only the minimal amount [of force] necessary” to control a resident and to set a positive example for juveniles in the agency’s care. The Written Notice explained that the grievant’s restraint of the Resident “turned into excessive force” under agency policies.

The hearing decision does not discuss whether the grievant engaged in misconduct that was not assault but that could nevertheless be a basis for discipline under the agency’s use-of-force and/or code-of-conduct policies. The hearing officer asserted that the grievant “was disciplined for kicking and punching that occurred in the shower room” and found that the evidence was not sufficient to prove those acts. However, the agency presented multiple witnesses who testified about other aspects of the grievant’s conduct that may violate the policy provisions listed on the Written Notice. For example, agency witnesses testified that the grievant and Ms. R should not have charged the Resident in the shower. Based on his review of the video footage and the investigation of the incident, the Superintendent concluded that the grievant and Ms. R “did not use the correct amount of

force. . . . They didn't have to go to the floor; they didn't have to use excessive force here." He further testified that the agency's use-of-force policy, by requiring employees to use only the minimum amount of force necessary, means that staff must use de-escalation tactics first if possible.

In sum, some evidence in the record could potentially support a charge that the grievant's pursuit of the Resident into the shower area violated the agency's requirements to minimize the use of force, de-escalate conflict if possible, and set a positive example for juveniles. Although a hearing officer's mere silence on an issue is not necessarily grounds for remand, given the decision's emphasis on hitting and kicking it is not clear that the hearing officer considered the other forms of misconduct charged on the Written Notice, about which the agency presented evidence at the hearing. Therefore, EDR remands the hearing decision for clarification and/or reconsideration as to whether the evidence supports a finding that the grievant's behavior other than alleged hitting and kicking constituted misconduct under agency policies cited by the Written Notice.

Contrary to the Agency's assertion, the Hearing Officer fully considered whether Grievant could be disciplined for offenses other than excessive use of force. There is no basis to uphold any discipline in this case because the Agency cannot rise above its Written Notice and its evidence to establish disciplinary action.

The Written Notice provides that, "[a]fter reviewing all of the documentation and evidence, it was determined [Grievant] violated policies SOP 218 Use of Force and VOL I-1, 2-01 Staff Code of Conduct.

The Written Notice clearly described Grievant's behavior (kicking and punching a resident) that the Agency considered excessive force. The Written Notice did not clearly describe other behavior that should give rise to disciplinary action. Grievant should not have been expected to wait until the hearing to find out what other actions the Agency considered improper.

The Agency did not establish that Grievant used excessive force.

The Agency presented evidence suggesting Grievant did not have to pursue the Resident into the shower area thereby minimizing the use of force. The Agency suggested Grievant could have used other means to de-escalate the conflict.

The Written Notice stated, "[r]estraining the resident was warranted" Moreover, the Deputy Director testified that "use of force was ok." Although Grievant could have responded without force and de-escalated the conflict by means other than using restraint, the Agency has conceded that Grievant's decision to restrain the Resident was appropriate. The Agency cannot now discipline for any offense relating to his decision to participate in the restraint of the Resident.

The Agency suggested Grievant's response was not therapeutic. Since Grievant was warranted to restrain the Resident, the Agency cannot discipline Grievant for engaging in a non-therapeutic response. The Deputy Director suggested de-escalation should have occurred prior to the door being pushed by the Resident, but that allegation does not appear in the Written Notice. Grievant attempted to de-escalate the conflict prior to attempting to restrain the Resident by speaking with the Resident in a calm and reasoned manner. The Resident did not wish to behave in a manner that would have de-escalated the matter. The Agency has not presented any evidence showing that further de-escalation would have worked to change the Resident's behavior. Since use of force was permitted when the Resident pushed the door, Grievant did not have to take further actions to de-escalate the conflict. The Deputy Director suggested two people were not necessary to push against the Resident. This allegation does not appear in the Written Notice and is not a violation of a policy, practice, or the Staff Code of Conduct.

No credible evidence was presented to show that Grievant used inappropriate language or failed to set a good example for the Resident. The video of the incident did not have sound. Grievant's reaction to the Resident's behavior was consistent with the Agency's authorization to restrain the Resident.

There is no basis to support disciplinary action in this case.

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 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