



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11430

Hearing Date: December 16, 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 16, 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. No evidence of prior active disciplinary action was introduced during the hearing.

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

The Unit had 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. Mr. A and Grievant 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.

Mr. A placed his right foot on a chair to adjust his shoe and shoe laces. Grievant 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. Mr. A stood facing the Resident talking to him. Mr. A moved away from the Resident as the Resident remained in the shower room doorway. Mr. A 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. Grievant continued to remove items from the Resident's room. A pile of the Resident's belongings were in front of the open door to his room. Mr. A 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 Grievant 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 Grievant inside the room. The door hit Grievant on her left elbow causing her pain. Mr. A observed the door hit Grievant. Mr. A and Grievant moved quickly in the direction of the Resident. Their objective was to restrain the Resident.

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

At some point, Grievant 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 Mr. A to her left, the Resident in front of her and Grievant to her left. The Resident was on his back trying to kick Mr. A and Grievant. The Resident was saying "Get off of me." Mr. A was trying to get the Resident to turn over so that the Resident could be restrained. Ms. A did not observe Mr. A kicking the Resident. She did not observe Grievant kicking the Resident. Grievant said, "He hit me!" Ms. A turned her focus to Grievant. Ms. A observed Grievant as "elevated" and "agitated." Grievant was furious and cursing. Ms. A told Grievant, "You need to leave and get out." Ms. A instructed another staff member to remove Grievant from the shower area. Mr. C "picked [Grievant] 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. Grievant was “crying profusely” as she left the Unit.

Grievant 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 Mr. A had kicked the Resident. His interview questioning appeared directed at confirming his belief.³

The Investigator interviewed Mr. A on July 7, 2019⁴ and on July 11, 2019. The Investigator asked: What was happening? What was going on? Mr. A 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 Mr. A for the third time. The Investigator asked, “Did you punch [the Resident] more than five times or less than five times? Mr. A 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? Mr. A replied, “I didn’t kick [the Resident] at all.

On July 11, 2019, the Investigator interviewed Grievant. Grievant 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? Grievant 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? Grievant answered, “I don’t recall.” The Investigator said, “At the end of the day, I am not trying to get you to say 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

² Agency Exhibit F.

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

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

time then we will just go through the video. Could you have hit him? Grievant said, "I, probably, yes."

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

The Investigator as asked, "Your partner [Mr. A] what [is] he doing? Grievant asked, "Is that him standing there?" The Investigator said yes. Grievant 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?" Grievant 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 Grievant and said, "kicking or stomping, kicking or stomping!"⁵

The Investigator asked, "How many times would you say with [Mr. A], punched, more than five or less than five?" Grievant 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?" Grievant answered, "I would say probably more than five, maybe about six." The Investigator asked, "Now with kicks, how many time would you say [Mr. A] kicked, more than five or less than five? Grievant 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." Grievant said, "I would say less."

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."⁶ 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."

Standard Operating Procedure 218 governs Use of Force and Mechanical Restraints. Section 218-4.0 provides:

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

⁶ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

When it is deemed necessary to use physical force to control a resident, only the minimal amount necessary is to be used. Physical force is authorized for

- a) Self-defense;
- b) The defense of others;
- c) To prevent an escape;
- d) To prevent property damage that may result in injury;
- e) To protect a resident from harming himself or herself; and/or
- f) To prevent the commission of a crime.

Under any other circumstances, the Superintendent or designee must grant approval before using physical force.⁷

“[P]hysical violence” is a Group III offense.⁸ On June 26, 2019, Grievant punched and kicked the Resident. Her actions were not authorized under the Agency’s Use of Force policy. Her behavior constituted physical violence. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant denied kicking and hitting the Resident. She claimed she told the Investigator she kicked and punched the Resident because she was answering a hypothetical question. The evidence showed that the Investigator told Grievant, “I am not trying to get you to say something you didn’t do.” After the Investigator’s statement, Grievant admitted to striking the Resident about five times and kicking him fewer than five times. The evidence is sufficient to conclude that Grievant admitted to physical violence against the Resident.⁹

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 **upheld**.

⁷ Agency Exhibit D.

⁸ See, Attachment A, DHRM Policy 1.60.

⁹ Mr. A testified he did not see Grievant kick or punch the Resident. Mr. A’s testimony is not persuasive because he was focused on avoiding being kicked by the Resident and not focused on Grievant’s behavior.

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.