



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11666

Hearing Date: July 1, 2021
Decision Issued: July 20, 2021

PROCEDURAL HISTORY

On November 2, 2020, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On December 2, 2020, 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 March 15, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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?

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 Corrections employs Grievant as a Captain at one of its facilities. He has been employed by the Agency for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing.

On August 14, 2020, the Major learned that Inmate G may have been in possession of a cell phone. The Major instructed Grievant to have Inmate G's cell searched. Inmate H was also assigned to that cell.

Grievant was working as Watch Commander for the Facility on August 15, 2020. Grievant instructed the Lieutenant to assemble a team and conduct the search.

If Grievant learned that staff used force on an inmate, Grievant was to have medical staff assess the inmate's condition and have corrections staff immediately draft internal incident reports.

On August 15, 2020, at 1:52 a.m., several employees entered the cell of Inmate G and Inmate H. Inmate G was sleeping in the top bunk bed. Inmate G awoke and became combative and began kicking. As Officer T tried to gain control of Inmate G, Inmate G

kicked Officer T in the mouth. Inmate G kicked Officer T because he believed he was being attacked by other inmates. Officer S, Officer M, and Officer T pulled Inmate G from the top bunk and onto the floor and placed him in handcuffs. This action was a use of force. Sergeant F and the Lieutenant were present but did not use force on Inmate G. They observed the cell search.

Grievant watched the search from the Watch Commander's Office using a video monitor and camera system. The video camera only showed the outside of Inmate G's cell. Grievant was not able to see the use of force inside the cell.

Grievant instructed the staff to bring Inmate G to the Watch Office. Officer T, Officer S, Officer C, and Officer M escorted Inmate G to the Watch Office. The Lieutenant and Sergeant F followed behind the corrections officers.

Inmate G and some of the employees entered the Watch Office to speak with Grievant. Officer T told Grievant that he went into the cell and Inmate G kicked Officer T in the face. Grievant asked Officer T if he was okay. Officer T said, "No" and that his mouth was sore but he was not seriously injured. Grievant asked Officer T if he wanted to press charges against Inmate G and Officer T said, "No."

Officer S stood in the hallway in front of the Watch Office doorway. He did not hear any discussion between Grievant and Officer T about having to use force or put Inmate G on the floor. He told Grievant that Inmate G became aggressive when they entered the cell and they had to restrain him after placing him on the floor.

Grievant said to strip search Inmate G and if the officers did not find any contraband to send Inmate G back to his cell.

The Lieutenant asked Grievant if he wanted staff to write internal incident reports. Grievant said, "No" because nothing was found and there was nothing to report.

The Lieutenant later told Officer S that Grievant said not to write an internal incident report.

Although no force was used on Inmate H, he falsely reported being assaulted by staff. The Agency began an investigation of the August 15, 2020 incident.

The Warden met with the staff involved in the incident. The Personnel Analyst took detailed notes of the meetings beginning on September 11, 2020.

Officer M told the Warden he did not tell Grievant there had been a use of force.

Sergeant F told the Warden it "wasn't really [a] use of force."¹

¹ Grievant Exhibit p. 5.

The Lieutenant told the Warden that Officer M and Officer T went into the cell first. After Inmate G kicked Officer T, they “pulled him to [the] floor.”² The Warden asked the Lieutenant if Grievant knew they used force. The Lieutenant said Grievant was told they moved the inmate to the floor and “we told him no.” The Personnel Analyst understood the Lieutenant to be saying that the Lieutenant asked Grievant if he needed to write a report. Grievant asked if there was a use of force and the Lieutenant told Grievant, “No.” Grievant then told the Lieutenant that if there was no use of force, there was no need to write reports.

Grievant met with the Warden. Grievant told the Warden that the Lieutenant asked Grievant if staff needed to write internal incident reports. The Lieutenant did not mention any use of force. Grievant replied, “No.”

Employees involved in the incident were asked by Agency managers to write internal incident reports. On September 11, 2020, Officer T wrote an internal incident report stating, “Once we gained control of the offender he was lowered to the floor and handcuffed.”³

On September 11, 2020, Officer S wrote an internal incident report stating, “I [Officer S] and officers [Officer M and Officer C] used minimum amount of force to get [Inmate G] off of his top bed area and placed him on the floor inside of the cell to gain control.”⁴

On September 12, 2020, Officer C wrote an internal incident report stating, “[Inmate G] was assisted to the floor with less force as possible”⁵

On September 12, 2020, Officer M wrote an internal incident report stating, “I [Officer M] and [Officer S] assisted [Inmate G] onto the floor with minimum force.”⁶

On September 12, 2020, Sergeant F wrote an internal incident report stating, “Officers assisted [Inmate G] off the top bunk with minimum force. [Inmate G] was placed on the floor where he was told multiple times ‘stop resisting’.”⁷

On September 15, 2020, Grievant wrote an email stating, “After everyone had left the Watch Office, [the Lieutenant] asked if he should write a report. Puzzled by this

² Grievant Exhibit p. 6.

³ Grievant Exhibit p. 18.

⁴ Grievant Exhibit p. 17.

⁵ Grievant Exhibit p. 12.

⁶ Grievant Exhibit p. 13.

⁷ Grievant Exhibit p. 19.

question, I asked if something had happened. [the Lieutenant] stated no. I then asked him directly was there any Use of Force and his reply again was no.”⁸

CONCLUSIONS OF POLICY

The Agency has established that corrections officers used force on Inmate G on August 15, 2020 when Inmate G was pulled from the top bunk and placed on the cell floor.⁹ The amount of force appears to be minimal.¹⁰

The Agency did not consider placing an inmate in restraints to be the use of force. Placing inmates in restraints was a routine practice at the Facility. When staff pulled Inmate G from his bunk bed against his will and placed him on the floor so that he could be placed in handcuffs, Agency employees used force.

Grievant did not observe force being used on Inmate G. Grievant is only responsible for failing to ask staff to complete internal incident reports if he knew or should have known that force was used on Inmate G. The Agency has not established that Grievant’s omission was misconduct.

The Agency alleges Grievant was told that there was a use of force on August 15, 2020 and Grievant failed to require staff to complete internal incident reports and take other actions required when staff use force on an inmate.

The Agency presented testimony of Officer S who testified he told Grievant there had been a use of force. The Hearing Officer does not believe Officer S used the words “use of force” but instead described the incident as Inmate G being aggressive and having to restrain him after placing him on the floor. The difficulty with Officer S’s testimony is that it was not corroborated by interview notes between Officer S and the Warden. It is difficult to confirm Officer S’s assertion that Officer S used the words “use of force.” The Hearing Officer concludes that Officer S’s testimony is less significant than the testimony of the Lieutenant.

The Lieutenant was the highest ranking employee observing the cell search. Grievant was entitled to rely on the Lieutenant’s statements. Grievant directly asked the Lieutenant if there was a use of force. Grievant used the phrase “use of force” in his question. The Lieutenant denied there was a use of force. The Lieutenant confirmed this

⁸ Grievant Exhibit p. 14.

⁹ The Agency’s witnesses defined use of force as beginning when Inmate G was pulled from the bed. It did not begin when Inmate G kicked Officer T. It does not appear that the Agency disciplined Grievant for failing to report that Inmate G kicked Officer T.

¹⁰ Several of the written descriptions of the incident appear to “downplay” the significance of removing Inmate G from the bunk bed.

statement of events when he met with the Warden. No facts were presented showing that Grievant knew or should have known not to trust the Lieutenant's answer.

The Agency has not established that Grievant knew corrections staff used force on Inmate G on August 15, 2020.¹¹ There is no basis for disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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.

¹¹ Although Grievant may have known that Inmate G was placed on the cell floor that fact alone does not show use of force. Another supervisor, Sergeant F, felt that moving Inmate G "wasn't really [a] use of force." Officer C and M described the process as "assisting" Inmate G to the floor. It is not clear Grievant was told how aggressively Inmate G was placed on the cell floor.

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.