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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5543
May 17, 2023

The grievant has requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s reconsideration decision in Case Number 11818. For the reasons set forth below, EDR will not disturb the reconsideration decision.

FACTS AND PROCEDURAL HISTORY

Case Number 11818 concerns a Group III Written Notice with termination of employment, issued to the grievant by the Department of Corrections (the “agency”) based on charges that the grievant used “excessive and unreasonable force” against an inmate. The relevant facts, as found by the hearing officer,¹ were recited in EDR’s first administrative review ruling in this matter and are incorporated herein by reference.² In his decision, the hearing officer concluded that the agency had failed to satisfy its burden of proof to support its disciplinary action.³ Accordingly, he reversed the Written Notice at issue and ordered the grievant to be reinstated.⁴ Upon review, however, EDR determined that the hearing decision lacked adequate findings as to whether the grievant violated agency policies regarding the use of reasonable force against an inmate.⁵ EDR further instructed the hearing officer to reconsider findings that the grievant reasonably perceived circumstances such as the inmate kicking other employees, appearing not to be handcuffed, and potentially possessing a weapon, with reference to supporting evidence in the record as appropriate.⁶

On March 23, 2023, the hearing officer issued a reconsideration decision.⁷ The decision did not articulate additional findings of fact but concluded that, upon consideration of EDR’s administrative review ruling and subsequent briefing by the parties, “the Hearing Officer will

¹ Decision of Hearing Officer, Case No. 11818 (“Hearing Decision”), August 18, 2022, at 2-4.

² EDR Ruling No. 2023-5452 at 1-3.

³ Hearing Decision at 6-7.

⁴ *Id.* at 7.

⁵ EDR Ruling No. 2023-5452 at 5-7.

⁶ *Id.* at 7-9.

⁷ Reconsideration Decision of Hearing Officer, Case No. 11818 (“Reconsideration Decision”), March 23, 2023.

uphold the Group III Written Notice with removal. The Original Hearing Decision is amended to uphold the Group III Written Notice with removal.”⁸

The grievant has requested that EDR administratively review the reconsideration decision on two grounds. First, the grievant contends that the hearing officer lacked subject-matter jurisdiction to issue any decision as to his grievance. Second, the grievant argues that neither the hearing decision nor the reconsideration decision contain findings of fact to support upholding the agency’s discipline.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁹ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.¹⁰ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹¹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Subject-Matter Jurisdiction

Under the grievance procedure, dismissal grievances are initiated directly with EDR for appointment to a hearing officer as appropriate.¹² However, the grievance procedure recognizes a statutory exception to EDR’s standard appointment process:

Pursuant to Va. Code § 2.2-3007, employees of the Departments of Corrections or Juvenile Justice, whose employment was terminated for (i) client, inmate, or resident abuse, (ii) a criminal conviction, or (iii) being placed on court probation . . . may file a dismissal grievance directly with EDR

As provided in Va. Code § 2.2-3007, dismissal grievances to which this section applies do not proceed to a formal hearing appointed by EDR . . . , but rather proceed to a de novo hearing on the merits of the termination before the circuit court in the jurisdiction in which the employee had been employed. If the grievance is properly filed and meets the compliance requirements, EDR will return the original grievance paperwork to the grievant with instructions to proceed to a hearing in the appropriate circuit court.¹³

⁸ Reconsideration Decision at 2.

⁹ Va. Code §§ 2.2-1202.1(2), (3), (5).

¹⁰ See *Grievance Procedure Manual* § 6.4(3).

¹¹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹² *Grievance Procedure Manual* § 2.5.

¹³ *Id.* § 5.10; Va. Code § 2.2-3007(A), (B).

In his request for administrative review, the grievant argues that this statutory exception to EDR's hearing process should have applied in his case. Specifically, the grievant asserts that the "agency's allegations concern alleged inmate abuse."¹⁴ As such, he argues, EDR should have declined to appoint a hearing officer and instead directed the grievant to the appropriate circuit court. Therefore, the grievant contends that the hearing officer lacked jurisdiction under the grievance statutes to issue any decision in this matter.

As indicated by section 5.10 of the *Grievance Procedure Manual*, EDR recognizes the jurisdictional limitations articulated in Code section 2.2-3007. Accordingly, upon receipt of a grievance from an employee dismissed from the Departments of Corrections or Juvenile Justice, EDR reviews the available information in such cases for evidence that the grievant has been "terminated on the grounds of client, inmate, or resident abuse"¹⁵ Because the agency determines whether to terminate and on what grounds, the agency's intended basis for termination will generally be dispositive as to EDR's jurisdictional assessment in this regard.

In determining the agency's intended basis for termination, we note that the Written Notice form contains a specific offense code for "Patient/offender/client abuse" (code number 81). Therefore, EDR would generally consider an agency's notation of offense code 81 on the Written Notice, with consistent factual allegations, to be clear and convincing evidence that the agency intended to terminate the grievant's employment on grounds of inmate abuse. Conversely, the agency's election *not* to invoke offense code 81 when it could have done so is significant. Moreover, to the extent that the agency reviews the dismissal grievance and determines that offense code 81 was omitted unintentionally, the agency may nevertheless challenge EDR's jurisdiction by reference to the nature of the alleged misconduct. However, when the agency has neither invoked offense code 81 nor objected to EDR's jurisdiction to appoint a hearing officer, these factors raise considerable doubt as to whether the agency intended to dismiss the grievant for inmate abuse.

In such situations, the agency's narrative allegations on the Written Notice would rarely present an independent basis for EDR to deny the grievant access to the administrative hearing process otherwise required by the grievance statutes. As the agency points out in its response brief, in the context of its operations, the use of excessive and/or unreasonable force against an inmate does not necessarily "rise to the level of offender abuse."¹⁶ In general, EDR would acknowledge and defer to the agency's discretion to distinguish between "abuse" and other types of offenses against inmates. Where, as here, the agency does not appear to have taken any procedural opportunities to charge the grievant with inmate abuse, and where the agency's allegations do not demonstrate a clear intent to charge the grievant with inmate abuse,¹⁷ EDR will not deem the

¹⁴ Request for Administrative Review at 2.

¹⁵ Va. Code § 2.2-3007(A).

¹⁶ Response to Request for Administrative Review at 4.

¹⁷ The Written Notice issued to the grievant in this case does not have code 81 for "Patient/offender/client abuse" selected. *See* Agency Exs. at 1.

grievance to fall within the statutory exception provided by Code section 2.2-3007.¹⁸ Accordingly, we decline to disturb the hearing officer's reconsideration decision on this basis.

Findings in Support of Reconsidered Hearing Decision

In his request for administrative review, the grievant also argues that neither the hearing decision nor the reconsideration decision contain adequate findings to support upholding the agency's disciplinary action, contrary to the conclusion in the original hearing decision.

In our first administrative review ruling, EDR concluded that not all of the hearing officer's findings appeared to find support in the record:

[W]e observe that the security footage of the incident does not support the potential dangers identified in the hearing decision. As the grievant approached the Inmate, the footage shows four or five agency employees holding him down on the ground. We cannot say that any part of the video evidence supports the hearing officer's findings that the Inmate's "movement was consistent with someone who was not handcuffed"; that the Inmate was attempting to roll and/or reach into his pants; or that the Inmate was violently kicking another officer before the grievant delivered knee strikes. . . .

[B]ecause the grievant's testimony conflicts with video of the incident as to the issue of danger, the weight apparently accorded to that testimony requires explanation. For example, at the time the grievant approached the scene, the hearing officer's finding that the Inmate was "clearly" not under control is not supported by the video evidence. . . . The video evidence does not support a determination that the Inmate was kicking anyone when the grievant reached the Inmate.

Additionally, it is not clear that the evidence supports the hearing officer's finding that the Inmate's "movements were consistent with someone who was not handcuffed," as we are uncertain what that statement refers to. Indeed, as the video of the incident shows, the grievant's position was directly at the level of the Inmate's arms, and we find nothing in the record to suggest why the grievant could not see the handcuffs, given his position. . . .

Similarly, we are unable to determine what evidence might support a reasonable perception that the Inmate could have a weapon. . . . To the extent that the hearing officer's reconsideration confirms any of these findings, the

¹⁸ EDR's appointment of a grievance to a hearing officer does not necessarily prevent either party from raising the issue of subject-matter jurisdiction at later procedural stages. In this case, it does not appear that either party ever took the opportunity to raise the issue for resolution by the hearing officer, and upon review we find no basis to conclude that the hearing officer erred with respect to this issue. Nevertheless, nothing in this ruling prevents either party from presenting arguments on this issue to the appropriate circuit court.

reconsideration decision must identify the grounds in the record to support such findings.¹⁹

Although the hearing officer emphasized that “[t]he Original Hearing Decision correctly states the facts of this matter based on the entire record of evidence the Hearing Officer considered to be credible, material, and persuasive,”²⁰ he did not offer additional factual findings or analysis upon reconsideration. Accordingly, the reconsideration decision does not revive the factual determinations that we previously found not to have record support. We interpret the reconsideration decision to adopt all previous factual findings that our first administrative review did not call into question. Based on those findings, the hearing officer apparently concluded upon reconsideration that the agency’s Group III Written Notice with removal should be upheld; *i.e.* the agency met its burden to prove that the grievant engaged in excessive, unreasonable force against an inmate under agency policy, as charged by the Written Notice, meriting disciplinary action at the Group III level.²¹ We conclude that the original hearing decision articulates findings of fact, based on evidence in the record, to support this determination.

In his original hearing decision, the hearing officer found that Officer H “placed handcuffs on the Inmate” and “placed his knee on the Inmate’s back to hold the Inmate down.”²² Nevertheless, Officer H “had great difficulty in trying to control the Inmate,” so other officers responded to the situation.²³ Specifically, three additional officers joined Officer H in holding the inmate down at his neck and legs.²⁴ Two K-9 officers also responded to the scene with dogs.²⁵ The grievant also responded to the scene, for a total of seven officers and two dogs present at the scene to control the inmate.²⁶ Upon arriving at the scene, “Grievant pinned the Inmate’s left arm with Grievant’s shin. . . . As Grievant tried to hold the Inmate down, Grievant struck the Inmate’s left rib area three times with his right knee while telling the Inmate to stop.”²⁷

The hearing officer further cited the applicable provisions of agency policy governing the use of force against inmates. Among the provisions cited by the hearing officer was that “only the amount of force that is reasonably necessary to overcome resistance, mitigate an incident, or gain control under the circumstances, is permissible.”²⁸ Moreover, the relevant policy provisions cited by the hearing officer stated that the appropriate use of force should be determined by factors including the “potential consequences if nothing is done,” the “degree of force threatened or used by the offender inmate,” the “employee’s reasonable perception of the danger of death or serious physical injury,” and “any alternatives available to control the situation without the use of force.”²⁹

¹⁹ EDR Ruling No. 2023-5452 at 7-9 (internal footnotes omitted).

²⁰ Reconsideration Decision at 1.

²¹ *Id.* at 2.

²² Hearing Decision at 2.

²³ *Id.* at 2-3.

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 3.

²⁸ *Id.* at 5.

²⁹ *Id.*

Under agency policies, then, the offense of unreasonable/excessive force could be proven by showing that the grievant's knee strikes against the inmate were not reasonably necessary to gain control of the situation. The hearing officer did not find that the knee strikes were reasonably necessary to gain control of the inmate, or that they had any mitigating effect on the situation. The hearing officer also did not find that the inmate had a weapon or reasonably posed a danger of death or serious physical injury at the time the grievant delivered knee strikes to the inmate's ribs. Although the hearing officer found that the grievant feared that the inmate could pose a danger to the officers on the scene, the hearing officer did not find that this fear was reasonable. The hearing officer did find that, at the time he struck the inmate, the grievant was pinning the handcuffed inmate down with four other officers, with two additional K-9 officers standing by. This finding is consistent with video evidence of the incident.³⁰

These findings support the conclusion articulated in the reconsideration decision that the grievant engaged in the misconduct of "unreasonable and excessive force," as defined by agency policy and charged on the Written Notice. Moreover, the agency's policies support disciplinary action at the Group III level for violating the requirement to make physical contact with inmates only "using the minimum amount of force necessary to provide appropriate apprehension intervention, and control as needed to protect the offender, staff, the general public, and to maintain a safe and secure environment."³¹

In sum, while the reconsideration decision could have offered analysis as to why the hearing officer reached a different conclusion than was stated in the original hearing decision, we find no error in the reconsideration decision when read together with the original hearing decision and EDR's first administrative review ruling. The reconsidered conclusion is supported by findings in the original hearing decision based on evidence in the record.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.²⁵ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.²⁶ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁷

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³⁰ See EDR Ruling No. 2023-5452 at 7 (citing Agency Exs. at 12).

³¹ Agency Exs. at 579, 590-91.