



JANET L. LAWSON
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5549
May 16, 2023

The Department of Corrections (the “agency”) 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 decision in Case Number 11874. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11874, as found by the hearing officer, are as follows:¹

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

On June 18, 2022, Grievant was working as the day shift Watch Commander. Sergeant C was notified by radio to respond to the Unit because an Inmate was refusing to allow staff to secure a tray slot on his cell door. Sergeant C attempted to de-escalate the Inmate but was unsuccessful. Corrections staff determined that the Inmate had broken off a piece of plastic from a television and shaped it in the form of an approximately 7 inch long knife. After the Inmate repeatedly refused to give up the knife, Sergeant C sprayed the Inmate with OC spray. Grievant arrived at the cell and also attempted to de-escalate the Inmate without success. The Inmate repeatedly threatened to kill staff. Sergeant W sprayed the Inmate with OC spray. Lieutenant B also later sprayed the Inmate with OC spray. The Inmate refused to give up his weapon.

Grievant contacted the Warden about using the canine unit as part of the cell extraction. The Warden and his supervisors discussed what to do. They decided to assemble a team of corrections officers and conduct a cell extraction. The Inmate’s cell was approximately 6 or 7 feet wide and 9 or 10 feet deep.

¹ Decision of Hearing Officer, Case No. 11874 (“Hearing Decision”), March 31, 2023, at 2-5 (citations omitted).

The cell extraction team consisted of Officer 1, Officer 2, Officer 3, Officer 4, Officer 5, Officer JH, and Officer BM. A canine Officer positioned his dog to the right side of the cell door to engage the Inmate if he exited the cell. The extraction team formed a line to enter the cell. Officer 1 and Officer 2 held shields. Extraction team members were wearing helmets and protective gear.

Grievant ordered two corrections officers to open the door. They slid the door open a few inches and the Inmate turned his right shoulder towards the opening and pushed his elbow out of the cell while his body remained inside. The officers tried to pin the Inmate's arm in the door but were unsuccessful. The Inmate moved his arm back into the cell. The officers pulled the door open again. The Canine Officer allowed the dog to enter the cell and the Inmate began stabbing the top of the dog's head. The Inmate stabbed the dog approximately five times. The Agency later determined that the dog was not injured.

Once the dog engaged the Inmate, the cell door was opened wider and the extraction team rushed into the cell. Chaos followed. Grievant also entered the cell and stood over top of the corrections officers as they attempted to restrain the Inmate. Officer 1 struck the Inmate with the shield and forced the Inmate to the ground. As they struggled, the shield was pushed to the side. The Inmate attempted to stab Officer 1 in the chest and face. Officer 1 used several stunning techniques by striking the Inmate on the side of the head because the Inmate kept fighting and trying to kill him.

The dog engaged the Inmate but then bit Officer 2. Grievant yelled "get the dog" to the Canine Officer. Grievant grabbed Officer 2 and told him to "get out, get out." Grievant then yelled "get him to medical." Several corrections officers ordered the Inmate to "stop resisting!" but the Inmate continued to fight.

The Inmate was on the floor next to the Inmate's bed. Officer 5 was facing down with the lower part of his body on the Inmate's bed. Officer 5's upper body was over top of the Inmate towards the right side of the Inmate's body. The Inmate was on his side as the officers tried to push him onto his stomach. Officer 5 was holding handcuffs in his right hand. He began hitting the Inmate in the head with the handcuffs and saying, "That's how the dog felt mother f—ker. That's how the f—king dog felt, mother f--ker." Officer M hit the Inmate approximately 45 times over an approximately 34 second time period, pausing four times and appearing to reposition/reestablish his grip.

Officer M's behavior of hitting the Inmate constituted physical abuse under the Agency's Use of Force Policy. Calling the Inmate "mother f—ker" was verbal abuse according to the Agency's Manager.

Officer 1 was able to get the weapon out of the Inmate's hand. Staff yelled several times, "the knife is out." The Inmate continued to struggle and fight.

Corrections officers secured the Inmate with leg irons but the Inmate continued to struggle. A corrections officer was able to get a handcuff on the Inmate's right wrist but his left arm remained free. The Inmate refused orders to roll over on his stomach so that handcuffs could be secured. Officer 1 used another stunning technique by jabbing the bottom of his forearm and elbow into the Inmate's left shoulder. The Inmate rolled onto his stomach and the handcuffs were attached to his left wrist.

Officer 1 suffered abrasions on both arms and back. Officer 2 was bitten by the canine on the right calf. Both staff were sent for medical evaluation and treatment.

Grievant instructed his staff to write incident reports and to describe their use of force.

Grievant reviewed the video that was available to him. He did not review the body camera videos of other staff because they were not available to him. In other words, at the time Grievant wrote incident reports, he did not know that Officer 1's video camera showed that Officer 5 had hit the Inmate with handcuffs.

The video camera for Officer TB does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer 4 does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer 2 does not show Officer 5 hitting the Inmate. It has the sound of the words, "mother f—ker" (18:19:07) but it is unclear who is saying the words.

The video camera for Officer MB does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Sergeant C does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer ZL does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Officer VC does not show Officer 5 hitting the Inmate. It does not have sound of Officer 5 mentioning how the dog felt.

The video camera for Grievant shows him referring to his watch to say the date and time and the name of the inmate involved in the cell extraction. It shows the bottom half of Officer 5's body as he is laying on the bed. The view of the top part of Officer 5's body is partially blocked by other corrections officers. Grievant points with his left arm and says, "get cuffs on there (18:19:34)." After other employees say the "knife is out", Grievant says "roll him over and get him cuffed."

The video has a faint sound of “mother” (18:19:08) but does not reveal who said this. To the extent Officer 5 is visible in the video, the camera shows the left side of Officer 5 with Officer 5 looking down and away from Grievant.

The video camera for Officer 1 shows the right arm of Officer 5 who is holding handcuffs. Officer 5 repeatedly strikes the Inmate (18:18:59) and says (18:19:08) “That’s how the dog felt mother f—ker. That’s how the dog felt mother f—ker.” Officer 5 hit the Inmate for the final time at 18:19:33. Officer 1 told investigators he did not see Officer 5 strike the Inmate on the head because he was focused on trying to remove the weapon from the Inmate that the Inmate was using to try to stab Officer 1.

The video camera for Lieutenant AN does not show Officer 5 hitting the Inmate. The sound does not record Officer 5 mentioning how the dog felt.

The video camera for Officer 3 does not show Officer 5 hitting the Inmate. The sound does not record Officer 5 mentioning how the dog felt.

The video camera for Officer 5 stopped recording before he began hitting the Inmate.

Officer 5 wrote an incident report stating that he “gave [the Inmate] a stunning technique by striking his head.” Officer 5 did not write that he used handcuffs to hit the Inmate. He did not write that he had called the Inmate a “mother f—ker.”

Grievant wrote an Incident Report on June 18, 2022. He did not mention the details of the cell extraction inside the cell and did not mention that Officer 5 had hit the Inmate and called the Inmate a “mother f—ker.”

Grievant wrote an Internal Incident Report on June 22, 2022. He did not mention Officer 5 hitting the Inmate and calling the Inmate a “mother f—ker.” The incident reports of the officers participating in the cell extraction were attached to the Internal Incident Report.

During a due process meeting on July 20, 2022, Grievant said that he did not see Officer 5’s actions and that he could not report what he did not see. He stated that the video of body cameras was not available to him at the time he wrote his reports.

The agency issued to the grievant a Group III Written Notice with removal on July 28, 2022.² The grievant timely grieved the disciplinary action, and a hearing was held on February 17, 2023.³ In a decision dated March 31, 2023, the hearing officer determined that the agency did not present sufficient evidence to support a Group III Written Notice with removal.⁴ Thus, the hearing

² Hearing Decision at 1; Agency Exs. at 1-4.

³ See Hearing Decision at 1.

⁴ *Id.* at 6-7.

officer ordered that the grievant must be reinstated with back pay, and that the disciplinary action must be rescinded.⁵ The agency now appeals the decision to EDR.

DISCUSSION

By statute, EDR has 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.”⁶ 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.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.¹¹ Thus, in disciplinary actions, the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.¹² Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In its request for administrative review, the agency asserts that the hearing officer’s factual findings were contrary to the weight of the evidence.¹³ The agency’s arguments are essentially about two factual matters: 1) whether the grievant saw any strikes with handcuffs, and 2) whether the grievant heard Officer 5 say, “That’s how the dog felt mother f—ker.”¹⁴ If the grievant saw the use of handcuffs or heard Officer 5’s statement, he should have reported that information and/or taken other action to intervene during the cell extraction, as is reflected in the Group III Written Notice issued by the agency.¹⁵ However, the hearing officer found that the agency did not meet its

⁵ *Id.* at 8.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ *See Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ The agency also argues that the hearing officer applied a heightened “beyond a reasonable doubt” standard in this case rather than a preponderance of the evidence standard. EDR has reviewed the hearing officer’s decision and finds no support for the argument that the hearing officer applied a heightened burden of proof in this case. *See* Hearing Decision at 2 (stating burden of proof as preponderance of the evidence).

¹⁴ Request for Administrative Review at 5.

¹⁵ Agency Exs. at 1-4.

burden to prove either that the grievant saw that handcuffs were used in any strikes observed or that the grievant heard Officer 5's statement.¹⁶

Having thoroughly reviewed the hearing record, EDR finds no basis to conclude that the hearing officer abused his discretion in determining that the preponderance of the evidence did not support a conclusion that the grievant observed strikes with handcuffs.¹⁷ The hearing officer found that the grievant credibly denied observing strikes with handcuffs.¹⁸ To prove that the grievant did observe the strikes with handcuffs, the agency relies on the multiple videos to infer based on the apparent placement of the grievant's head in one video that he must have seen the strikes through a gap between the officers involved in the extraction.¹⁹ Having reviewed the cited portions of the video evidence, EDR cannot find that the video evidence so clearly supports the agency's version of events that the hearing officer's findings were not supported by the record.

Similarly, the evidence is conflicting as to whether the grievant heard Officer 5's statement. The statement is apparent on one video, and the hearing officer found that the statement can be partially heard on the grievant's body camera video.²⁰ However, as the hearing officer determined, the grievant denied hearing the statement.²¹ Again, upon thorough review of the record, EDR cannot find that the totality of the evidence so clearly supports the agency's version of events such that the hearing officer's determinations are not supported by the record. Given the chaotic nature of the situation depicted by the video evidence, it is not unreasonable that the hearing officer could find that the agency had not established by a preponderance of the evidence that the grievant heard Officer 5's statement.

In summary, the hearing officer clearly found that, based on the evidence in the record, or lack thereof, the agency had not presented sufficient evidence to carry its burden to establish two critical factual matters. Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts are precisely the kinds of determinations reserved solely to the hearing officer, who may observe the demeanor of the witnesses, take into account motive and potential bias, and consider potentially corroborating or contradictory evidence. Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.²² Accordingly, EDR cannot substitute its own judgment for that reflected in the hearing decision; we perceive no reversible error in the hearing officer's analysis of the factual issues.

¹⁶ Hearing Decision at 6-7.

¹⁷ See Hearing Decision at 6-7.

¹⁸ *Id.*; see also Hearing Recording at 6:36:00-6:36:30, 6:37:40-6:38:12, 6:54:50-6:55:00, 7:04:20-7:04:34 (grievant's testimony).

¹⁹ Request for Administrative Review at 5-9 (citing to body camera evidence contained at Agency Exhibits 6, 7, 8, and 10).

²⁰ Hearing Decision at 5, 7.

²¹ *Id.* at 7; see also Hearing Recording at 6:38:18-6:38:41, 7:04:34-7:05:15 (grievant's testimony).

²² See, e.g., EDR Ruling No. 2020-4976.

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.²³ 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.²⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁵

Christopher M. Grab
Director
Office of Employment Dispute Resolution

²³ *Grievance Procedure Manual* § 7.2(d).

²⁴ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁵ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).