



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 2024-5594
August 15, 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 decision in Case Number 11885. For the reasons set forth below, EDR declines to disturb the hearing decision.

FACTS

The relevant facts in Case Number 11885, as found by the hearing officer, are as follows:¹

The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received training regarding Close Range Subject Control. He was taught Mechanical Advantage Hold Control (“M.A.C.H.”). Under this training:

Absolutely NO strikes are to be taught during this Controlled F.O.R.C.E. ® VADOC BCO Phase I Close Range Subject Control Training Course.

On June 22, 2022, the Inmate blocked the tray slot in his cell door. 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, the Inmate was sprayed with OC spray. The Inmate repeatedly threaten[ed] to kill staff. Grievant heard the Inmate say he was going to kill staff because he wanted an extra meal. The Inmate was again sprayed with OC spray. The Inmate refused to give up his weapon. Agency managers decided to assemble a cell extraction team to enter the cell and remove the weapon.

¹ Decision of Hearing Officer, Case No. 11885 (“Hearing Decision”), July 10, 2023, at 2-3 (citation omitted).

Grievant was part of the cell extraction team. The team formed a line to enter the cell. Grievant was holding a shield at the front of the line. Upon entering the cell, Grievant struck the Inmate with the shield as Grievant had been trained and knocked the Inmate down to the floor. Grievant's shield went to the side and Grievant rolled on top of the Inmate along with other staff attempting to restrain the Inmate. While on the ground, the Inmate continued to fight staff and tried to stab and hit Grievant in his chest. The Inmate wounded Grievant.

Grievant used stunning techniques and struck the Inmate on the head to try to get the Inmate to comply with orders and retrieve the weapon from the Inmate's hand. The Inmate continued to be combative. Grievant was able to remove the knife. Grievant used a stunning technique to hit the Inmate in the head to gain control. Grievant used another stunning technique to the side of the Inmate's head. Grievant's objective was to use his forearm to hit the Inmate in the back of the shoulder to distract him. Grievant believed that the strike caused the Inmate to stop resisting. The Inmate complied with Grievant's orders and handcuffs were secured on the Inmate. Staff secured leg irons on the Inmate. A safety hood was placed on the Inmate to prevent him from spitting on staff. The Inmate was removed from the cell in handcuffs and leg irons. Grievant's strikes did not injure the Inmate.

Grievant wrote an incident report stating, "While trying to restrain the inmate I utilized several stunning techniques to the head and face area due to his continued disruptive behavior and resisting all attempts for restrains to be placed on him."

Throughout the cell extraction until the Inmate was in control, corrections officers instructed the Inmate to stop resisting. The Inmate disregarded that instruction and continue[d] to fight corrections staff.

The Department of Corrections ("the agency") issued to the grievant a Group III Written Notice with suspension for "physical abuse, use of force" on July 28, 2022.² The grievant timely grieved the disciplinary action, and a hearing was held on March 22, 2023.³ In a decision dated July 10, 2023, the hearing officer determined that the agency presented sufficient evidence to support a Group III Written Notice.⁴ The hearing officer further found that "no mitigating circumstances exist to reduce the disciplinary action."⁵ The grievant 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

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

³ See Hearing Decision at 1.

⁴ *Id.* at 4-5.

⁵ *Id.* at 5.

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

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 his request for administrative review, the grievant argues that the hearing decision does not comply with the grievance procedure because the hearing officer did not explain crediting the agency’s witness, who believed excessive force had occurred, over the testimony from two of the grievant’s witnesses who allegedly testified that the grievant’s conduct was not excessive force. While the hearing officer could have provided a more detailed discussion here, EDR’s review of the record does not find that further discussion was required by the grievance procedure or *Rules for Conducting Grievance Hearings*.¹³ The basis of the hearing officer’s decision was stated as follows:

[I]f employees apply force using techniques not trained by the Agency, the employees are likely to have engaged in using excessive force. In this case, Grievant was not trained to use strikes while using force to control an inmate. Because Grievant was not trained to use strikes, the Agency’s assessment that Grievant used excessive force must stand even though the force used caused the Inmate to stop resisting.¹⁴

The hearing officer’s determinations are based on his factual findings that the strikes used by the grievant were not trained by the agency. EDR’s review of the record does not find that there is

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 See *Rules for Conducting Grievance Hearings* § V(C) (“If a case is decided on issues of disputed facts, the hearing officer must identify and explain the reasoning in resolving the dispute(s).”); see also, EDR Ruling Nos. 2022-5413, 2022-5414; EDR Ruling No. 2022-5399 (“only exceedingly rare circumstances might merit remand with instructions for the hearing officer to justify a credibility determination.”).

¹⁴ Hearing Decision at 5.

disputed evidence on this point.¹⁵ While the grievant points to testimony from two witnesses whose opinions about the grievant's behavior were inconsistent with the agency's witness, their testimony was not necessarily in conflict with the agency's evidence. For example, while a training Captain testified to his belief that the force used by the grievant was not excessive, he also acknowledged that the grievant's behavior was excessive per the agency's policy.¹⁶ The other witness, the training Lieutenant, testified that a strike would be appropriate to protect self or others when everything else had failed.¹⁷ The hearing officer addressed this contention, determining that the grievant's conduct was not self-defense, specifically finding that the grievant's "strikes did not appear designed to prevent the Inmate from striking Grievant or other staff."¹⁸ Consequently, EDR cannot find that there was discussion the hearing officer omitted from the decision that was required to be included to support the hearing officer's determinations such that remand is warranted.

In summary, the hearing officer clearly found that, based on the evidence in the record, the agency had presented sufficient evidence to carry its burden to establish discipline at the Group III level. 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.¹⁹ 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 or how they were discussed in the decision.

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.²⁰ 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.²¹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²²

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁵ See, e.g., Hearing Recording at 3:16:38-3:17:39, 4:08:25-4:09:07, 4:25:34-4:27:37, 5:11:44-5:13:18.

¹⁶ *Id.* at 5:14:45-5:17:10, 5:28:18-5:29:09, 5:30:32-5:30:50. This witness further testified that the agency's policy states that an employee in the grievant's situation should just keep using the "M.A.C.H.'s". *Id.* at 5:26:31-5:27:10.

¹⁷ *Id.* at 4:35:22-4:36:01. This witness also testified that the grievant should have used approved training methods if they could be. *Id.* at 4:36:01-4:36:28.

¹⁸ Hearing Decision at 5. The hearing officer stated in the decision that one of the strikes occurred after the knife was removed from the inmate. *Id.*

¹⁹ See, e.g., EDR Ruling No. 2020-4976.

²⁰ *Grievance Procedure Manual* § 7.2(d).

²¹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²² *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).