Issue: Compliance – Grievance Procedure (other issue); Ruling Date: February 23, 2017; Ruling No. 2017-4495; Agency: Department of Corrections; Outcome: Grievant in Compliance.

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

RECONSIDERED COMPLIANCE RULING

In the matter of the Department of Corrections
Ruling Number 2017-4495
February 23, 2017

The Department of Corrections (the "agency") has requested reconsideration of EDR's determinations in a prior ruling regarding the grievant's November 28, 2016 dismissal grievance initiated with the Office of Employment Dispute Resolution[1] ("EDR") at the Department of Human Resource Management ("DHRM").

FACTS

On or about November 28, 2016, the grievant initiated a dismissal grievance directly with EDR to challenge his separation from employment on November 9, 2016. Following the appointment of a hearing officer to this matter, the agency has asserted that the grievant is not entitled to an administrative hearing with EDR, as the case involves a termination for alleged abuse of an offender. Accordingly, it requested a ruling that the case be closed and heard in the Circuit Court of the jurisdiction in which the grievance occurred.

In the prior ruling, EDR held the following:

> The Code of Virginia does not define the word "abuse" as used in section 2.2-3007. Absent such a definition, EDR must look to the plain meaning of the statute, and in so doing, finds that abuse of an inmate must be specifically cited on a Written Notice as the misconduct charged in order for the grievance to fall under the provisions of this statute. A plain reading of the language used on the Written Notice in this case states that the grievant was terminated for use of excessive force against an inmate and a failure to exercise due care, a charge which does not necessarily imply that "abuse" of an inmate has occurred. EDR must find a specific charge of inmate abuse cited under Section II of the Written Notice, which details the offense, before rendering a determination that jurisdiction of the case lies with the Circuit Court, rather than interpreting the implicit meaning of a charge or the agency's intent behind a Written Notice.

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

> Therefore, this grievance does not fall under section 2.2-3007 of the Code of Virginia and, accordingly, must be allowed to proceed to a hearing with an EDR-appointed hearing officer.

The agency disputes this analysis on various grounds and requests that EDR reconsider its determinations.

DISCUSSION

EDR's "changed" approach

The agency's first allegation is that EDR's approach to these types of cases has changed without explanation. While EDR disagrees that there has been a significant change, to the extent there has been such a change, it is not without explanation. For the handful of these types of cases EDR has seen over the past few years, EDR has been generally deferential to the agency's opinion of the particular facts of individual cases involving allegations suggested to be "abuse" in concluding that jurisdiction should be with the Circuit Court. Having viewed a variety of cases during this time, questions arose as to how to properly define an allegation of "abuse" given the wide variety of cases that fell at varying places on a spectrum from facts that are specifically charged or clearly describe "inmate abuse" to those that are not so clear. As such, a more consistent approach is necessary to provide clarity to the grievance process and EDR's jurisdiction.

Prior to the instant case being filed, EDR had expressed to the agency the need to have a better understanding of the difference between cases that are explicitly charged as "inmate abuse" on the Written Notice and those that are charged as "excessive force," like the case at issue. For example, it is reasonable to question whether all uses of excessive force are cases of "inmate abuse." EDR's questions in this regard are especially highlighted by the agency's classification of this case, and similar cases, under Code 99 for "Other" types of misconduct, rather than the readily available Code 81 for "Patient/inmate/client abuse." It is again reasonable to question whether an agency has classified the misconduct as "abuse" when the code for such a charge is not selected and the conduct is not even specifically named as such.[2] These considerations have direct implication for an administrative proceeding beyond jurisdiction and require clarity. The proof schemes may differ between an agency having to show that an employee has engaged in "abuse" versus a use of excessive force. Consequently, EDR, as expressed in the prior compliance ruling, sought to provide a clearly articulated standard by looking at the explicit charge on the Written Notice rather than attempting to interpret the implicit intent of the charge.

Any change in EDR's approach is the result of the cumulative effect of having reviewed different cases over time and being unclear on what differentiates those that the agency explicitly charges as "inmate abuse" and those it does not. The case at issue was not clearly "inmate

[2] In its original motion to close this grievance, the agency stated that the grievant was charged with "intentional" abuse of an inmate. While that is the agency's apparent position at this time, the agency has not explained why that charge was not explicitly stated on the Written Notice or why the Code 81 for such a charge is not selected.

abuse" for the reasons described in the prior ruling. The approach described in the prior ruling is meant to bring a clearly articulated standard that can be consistently and accurately applied to this case and future cases like it. As such, EDR is not persuaded by the agency's argument that any changes are without explanation.[3]

Statutory Interpretation Arguments

The agency argues that EDR has misinterpreted the Code of Virginia by not understanding the purported difference between being terminated "for abuse" (language used in the grievance procedure) versus terminated "on the grounds of . . . abuse" (language used in the Code). While EDR has reviewed the agency's submission, the arguments raised as to the differences in meaning between these two phrases and, more importantly, how that applies to this case is not clear. In EDR's view, the two phrases appear to ask the same question: was the charge that led to the employee's termination inmate abuse? For the reasons described above and in the prior ruling, EDR has tried to understand and address the difference between cases charged explicitly as "inmate abuse" and those that are not. Application of the words "on the grounds of" does not appear to result in a different meaning. Further, it is not apparent to EDR how these words would affect the outcome of the analysis in this case, and the agency has not demonstrated anything to the contrary in any clearly articulable way in its submission.

The agency also argues that EDR is incorrect that the term "abuse" is not defined in the Code of Virginia. It is important to note that EDR stated in the prior ruling that there is no definition of "abuse" as that term is used and applied in section 2.2-3007 of the Code of Virginia specifically. Nothing cited by the agency has indicated that such a definition exists. All of the definitions cited by the agency, while perhaps analogous, are not definitions operable in section 2.2-3007 of the Code.

However, EDR would note that in many of the definitions cited by the agency, "abuse" is defined in terms of "knowing," "reckless," or "intentional" actions. Indeed, the term "neglect" is separately listed, for example, in the discussion of "abuse" in terms of mental health patients. As discussed in the original ruling, the conduct charged by the agency involved a failure to exercise "due care," i.e., negligent behavior, if a plain meaning is provided to this language. Given the repeated use of the terms "knowing," "reckless," and "intentional" in definitions of abuse, a reasonable conclusion could be made that "abuse" does not include the type of negligent behavior, i.e., a failure in due care, similar to that described on the Written Notice in this case.

CONCLUSION

[3] The agency also cites legal precedent that a change in an agency's consistently applied statutory interpretation is not due deference. While EDR may dispute as to how consistent its interpretation has been in the past (for example, the cases cited by the agency in its submission, while subject to similar critiques that are at issue here, largely describe activities far more intentional than the failure to exercise "due care" in this case), the legal precedents cited by the agency have no bearing on this case. Should EDR's interpretation be subject to legal review in a court, said precedents may be relevant, but at this stage they are inapposite.

EDR has reviewed the agency's submission and finds no basis to change its analysis or the outcome of the original ruling. It may very well be that the agency considers the grievant to have engaged in intentional abuse of an inmate and that the evidence may well support such a contention. EDR must, however, assess whether jurisdiction is appropriate based on the conduct actually charged in this case. Based on EDR's analysis in this ruling and the prior ruling, the conduct *charged* on the Written Notice was not "abuse," but rather "excessive force," and not intentional misconduct clearly amounting to "abuse." Accordingly, this case will proceed to an administrative grievance hearing appointed by EDR. EDR's rulings on matters of compliance are final and nonappealable.[4]

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[4] *See* Va. Code §§ 2.2-1202.1(5); 2.2-3003(G).