Issue: Administrative Review of Hearing Officer's Decision in Case No. 11173; Ruling Date: July 27, 2018; Ruling No. 2019-4757; Agency: Department of State Police; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of State Police
Ruling Number 2019-4757
July 27, 2018

The grievant has requested that the Office of Equal Employment and Dispute Resolution ("EEDR") at the Virginia Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 11173. For the reasons set forth below, EEDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11173, as found by the hearing officer, are incorporated by reference.[1] On January 5, 2018, the grievant was issued a Group III Written Notice with a ten-workday suspension for using excessive force during an arrest.[2] The grievant filed a grievance to challenge the disciplinary action and a hearing was held on May 30, 2018.[3] In a decision dated June 30, 2018, the hearing officer concluded that the agency had presented sufficient evidence to show that the grievant's use of force while arresting the Driver was excessive and upheld the issuance of the Written Notice and the ten-workday suspension.[4] The grievant now appeals the hearing decision to EEDR.

DISCUSSION

By statute, EEDR 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."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[6] The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.[7] The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

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[1] Decision of Hearing Officer, Case No. 11173 ("Hearing Decision"), June 30, 2018, at 2-12.
[2] *Id.* at 1.
[3] *See id.*
[4] *Id.* at 13-19.
[5] Va. Code §§ 2.2-1202.1(2), (3), (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

Hearing Officer's Consideration of Prior Discipline

In his request for administrative review, the grievant contends that the hearing officer erred in considering evidence about his receipt of a prior Group I Written Notice. In particular, the grievant asserts that the hearing office should have rejected the agency's use of the prior Written Notice and that she improperly determined "that it was for a similar offense" to the disciplinary action at issue in this case. The evidence in the record shows that, in 2014, the agency issued a Group II Written Notice to the grievant for "us[ing] excessive/unnecessary force during an arrest/custody procedure."[8] A hearing officer subsequently reduced the discipline to a Group I Written Notice for "engag[ing] in behavior that was contrary to the training provided" by the agency during an arrest.[9] The Group I Written Notice became inactive on August 20, 2016.[10] In the hearing decision, the hearing officer found that "the Agency may consider an inactive group notice in determining the appropriate disciplinary action if the conduct or behavior is repeated," that the "Grievant's prior misconduct and group notice involved a similar circumstance" because both cases "involve[d] the force Grievant employed to effectuate a subject's arrest or detention," and therefore "the Agency's consideration of the prior group notice was appropriate."[11]

DHRM Policy 1.60, *Standards of Conduct*, provides that "an inactive [Written Notice] may be considered in determining the appropriate disciplinary action if the conduct or behavior is repeated."[12] Although the level of offense and the specific misconduct underlying the issuance of the two Written Notices were not identical in this case, both the 2014 Written Notice and the Group III Written Notice arose out of incidents that involved the grievant's alleged use of excessive force during an arrest.[13] As a result, it was not error for the hearing officer to consider the grievant's disciplinary history in making her decision.

More importantly, however, the Written Notice at issue here charged the grievant with using excessive force during an arrest, which is defined as a Group III offense by the agency.[14] The hearing officer correctly noted that, "even without considering the former group notice," the agency's issuance of a Group III Written Notice was appropriate "because even the first occurrence of using unnecessary force is a Group III offense."[15] In other words, the level of discipline imposed in this case was consistent with the agency's policy regardless of the grievant's disciplinary history. Any error in the hearing officer's consideration of the grievant's disciplinary history, if such error in fact occurred, was therefore harmless. Accordingly, EEDR will not disturb the hearing decision on this basis.

[8] Joint Exhibit 11 at 6.
[9] *See id.* at 5-22.
[10] *Id.* at 5.
[11] Hearing Decision at 17-18.
[12] DHRM Policy 1.60, *Standards of Conduct*, § G(1)(b). The agency's policy on disciplinary measures contains the same language as the DHRM policy. Joint Exhibit 30 at 12.
[13] *See* Joint Exhibit 1; Joint Exhibit 11 at 5-6.
[14] Joint Exhibit 30 at 8-11.
[15] Hearing Decision at 18.

Hearing Officer's Consideration of Evidence

The grievant further argues that the hearing officer's findings of fact, based on the weight and credibility that she accorded to witness testimony presented at the hearing, are not supported by the evidence. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[16] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[17] 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.[18] 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.[19] 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 upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In the hearing decision, the hearing officer assessed the evidence and determined that the "force employed by Grievant was unjustified."[20] The hearing officer found that the agency's policy directs employees to use "only that force [that is] reasonably necessary to effectively bring an incident under control,"[21] and that the unnecessary use of force is classified as a Group III offense by the agency.[22] The hearing officer considered the totality of the circumstances, noting that the "Driver did not assault the [grievant] or attempt to do so"; that any resistance the Driver made was passive; that the "Driver had no way to utilize his hands or arms to protect his face or lessen the impact"; that the "Grievant slammed the [D]river to the ground"; and that the grievant was "trained to instruct others in defensive tactics," and thus knew or should have known of alternative tactics "that would have been less likely to cause the serious injury" that occurred here.[23] As a result of this analysis, the hearing officer concluded that, the "Grievant used unnecessary force and that the conduct violated General Order OPR 5.01," thereby justifying the issuance of a Group III Written Notice.[24]

In support of his position that the hearing officer erred in upholding the issuance of the Group III Written Notice, the grievant essentially challenges the hearing officer's factual findings and conclusions regarding the incident and his use of force against the Driver. For example, the grievant alleges that: (1) the hearing officer improperly relied on the video recording of the incident rather than the grievant's testimony about what occurred; (2) the factors cited in the agency's defensive tactics manual for assessing whether an employee's use of force

[16] Va. Code § 2.2-3005.1(C).
[17] *Grievance Procedure Manual* § 5.9.
[18] *Rules for Conducting Grievance Hearings* § VI(B).
[19] *Grievance Procedure Manual* § 5.8.
[20] Hearing Decision at 15.
[21] *Id.* at 13; *see* Joint Exhibit 27 at 1.
[22] Hearing Decision at 17; *see* Joint Exhibit 30 at 8-11.
[23] Hearing Decision at 14-15.
[24] *Id.* at 17-18.

was appropriate, as set forth in *Johnson v. Glick*,[25] do not support a conclusion that the grievant's use of force was excessive; (3) agency policy states that the grievant had the discretion to determine the level of force and/or technique to be used against the Driver; and (4) "[t]he majority of the investigating troopers of rank . . . opined that the force used by the grievant was justified and minimal." In addition, the grievant argues that he has "taken a course as a defensive tactics instructor, but he has never trained other state troopers in defensive tactics," and thus he "possessed no greater knowledge of defensive tactics than any other road patrol trooper" when the incident occurred.

EEDR has thoroughly reviewed the hearing record and finds that there is evidence to support the hearing officer's conclusion that the grievant's use of force against the Driver was excessive, violated General Order OPR 5.01, and was properly considered a Group III offense. The agency's policy states that employees should "use only that force reasonably necessary to effectively bring an incident under control."[26] The hearing officer viewed the video recording of the incident and described her observations from the video in detail in her decision.[27] At the hearing, agency witnesses testified that, when investigating the incident, they watched the video, reviewed the grievant's written account of the incident, and concluded that the level of force used by the grievant to gain control of the Driver was excessive.[28] Witness testimony further supports the hearing officer's conclusion that the grievant could have used other maneuvers to gain control of the situation that would not have resulted in the injuries the Driver sustained here.[29] In particular, there is evidence in the record that the Driver did not use force against the grievant,[30] that the grievant reacted to the Driver's passive resistance with a "violent takedown,"[31] and that the grievant had control of the Driver's hands when he performed the takedown maneuver.[32] Although the agency's defensive tactics manual states that it is intended to serve as a "guide" for employees and does not include an exhaustive list of approved responses for situations when force must be used,[33] there is witness testimony that the maneuver the grievant used on the Driver, which he described as a "takedown from the rear," was not listed in the defensive tactics manual and was not consistent with agency policy regarding the acceptable use of force under the circumstances presented here.[34]

Furthermore, EEDR is not persuaded by the grievant's assertions regarding the hearing officer's consideration of the factors set forth in *Johnson v. Glick*. The grievant alleges that "the video can be viewed with equal deference to the force utilized by the grievant," and that the hearing officer "injected personal opinions" into her assessment of the evidence. In the decision,

[25] 481 F.2d 1028 (2d Cir. 1973).
[26] Joint Exhibit 27 at 1.
[27] Hearing Decision at 3, 14-15; *see* Joint Exhibit 32.
[28] *E.g.*, Hearing Recording at Track 2, 22:56-26:21 (testimony of Witness S), Track 3, 20:45-21:15 (testimony of Witness T), Track 3, 40:17-42:00 (testimony of Witness D), Track 4, 4:31-5:28, 11:53-12:45 (testimony of Witness R).
[29] *E.g.*, Hearing Recording at Track 2, 13:25-14:27 (testimony of Witness S).
[30] *E.g.*, *id.* at Track 3, 40:35-40:37 (testimony of Witness D), Track 4, 4:53-5:21 (testimony of Witness R).
[31] *E.g.*, *id.* at Track 4, 4:53-5:28 (testimony of Witness R).
[32] *E.g.*, *id.* at Track 2, 10:02-10:22 (testimony of Witness S), Track 3, 40:55-41:08 (testimony of Witness D), Track 4, 9:12-9:36 (testimony of Witness R), Track 5, 16:59-18:05 (testimony of Witness A).
[33] Joint Exhibit 35; *see* Hearing Recording at Track 7, 35:15-36:51 (testimony of Witness J).
[34] *E.g.*, Hearing Recording at Track 2, 14:42-15:29 (testimony of Witness S).

the hearing officer discussed the *Johnson* factors[35] and found that "the brute force used [by the grievant] was in excess of what was warranted under the circumstances."[36] Significantly, the *Johnson* factors are used by courts in cases involving an alleged violation of a plaintiff's civil rights under 42 U.S.C. § 1983.[37] While an assessment of the *Johnson* factors could be considered relevant to the facts of this case,[38] such an assessment is not dispositive because the grievant was not disciplined for violating the Driver's civil rights; he was instead charged with using excessive force while arresting the Driver in violation of General Order OPR 5.01.[39] As discussed above, the hearing officer found that the agency had presented sufficient evidence to support the charge on the Written Notice, and that conclusion is supported by the evidence in the record. Thus, any consideration of *Johnson v. Glick* appears immaterial and is harmless error, if any.

The grievant is correct that the agency's policy states the employee involved in a particular incident is typically in the best position to determine the appropriate level of force to be used in an interaction.[40] However, several witnesses also testified that incidents involving an employee's use of force are reviewed to determine whether the force used appears to be excessive for the situation.[41] Here, the Driver's injuries were one of the factors taken into account by management when reviewing the grievant's conduct.[42] The agency presented evidence to show that, based on the totality of the circumstances, it determined that the level of force the grievant used to control the Driver was not reasonable.[43] While several witnesses testified that they believed the grievant's use of force was appropriate to the situation,[44] conclusions as to the credibility of witnesses 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. Furthermore, the hearing officer discussed the grievant's testimony about the incident and found that it was not credible because his account was inconsistent with some aspects of the video recording.[45] Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EEDR 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

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[35] The *Johnson* factors are: (1) "the need for the application of force," (2) "the relationship between the need and the amount of force that was used," (3) "the extent of injury inflicted," and (4) "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
[36] Hearing Decision at 16.
[37] *Johnson*, 481 F.2d at 1029. *Johnson* was subsequently overruled in certain respects by the U.S. Supreme Court, as well as eliminating use of the fourth *Johnson* factor. Graham v. Connor, 490 U.S. 386, 393-98 (1989).
[38] The *Johnson* case and its factors, including subsequent review in *Graham*, are discussed in the agency's defensive tactics manual. Joint Exhibit 35.
[39] Joint Exhibit 1.
[40] Joint Exhibit 27 at 1; *see, e.g.*, Hearing Recording at Track 3, 21:33-22:56 (testimony of Witness T).
[41] *E.g.*, Hearing Recording at Track 2, 22:56-24:40 (testimony of Witness S), Track 3, 23:00-23:55 (testimony of Witness T), Track 4, 7:42-8:31 (testimony of Witness R), Track 5, 13:52-15:09 (testimony of Witness A).
[42] *Id.* at Track 2, 24:42-25:47 (testimony of Witness S), Track 4, 8:33-8:50 (testimony of Witness R), Track 5, 15:11-15:20 (testimony of Witness A).
[43] *E.g.*, *id.* at Track 2, 25:48-26:21 (testimony of Witness S), Track 3, 20:45-21:15 (testimony of Witness T), Track 3, 40:17-42:00 (testimony of Witness D), Track 4, 4:31-5:28, 11:53-12:45 (testimony of Witness R).
[44] *E.g.*, *id.* at Track 3, 3:27-3:45 (testimony of Witness O), Track 7, 14:47-16:01 (testimony of Witness B), Track 7, 33:12-35:13 (testimony of Witness J).
[45] Hearing Decision at 14-16.

supports the version of facts adopted by the hearing officer, as is the case here.[46] Because the hearing officer's findings of fact with regard to these issues are based upon evidence in the record and address the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In relation to the grievant's knowledge of defensive tactics, the hearing officer found that the grievant was a "Defensive Tactics Instructor" and that he "possessed the training to employ more wide ranging defensive tactics when effectuating an arrest than a sworn officer (officer) who has only basic training in employing defense tactics."[47] At the hearing, the grievant testified that he had taken a defensive tactics trainer course, but did not obtain a certification to teach defensive tactics to employees.[48] It was not necessarily unreasonable or contrary to the facts for the hearing officer to conclude, based on the grievant's own testimony, that his knowledge of defensive tactics was greater than the average employee's due to his advanced training. More importantly, however, and as stated above, hearing officers must make "findings of fact as to the *material issues* in the case"[49] and determine the grievance based "*on the material issues* and grounds in the record for those findings."[50] EEDR has reviewed nothing to suggest that the grievant was unaware of the agency's defensive tactics manual or lacked sufficient training to adequately handle incidents requiring the use of force, such as the one that occurred here. Whether the grievant had advanced knowledge of defensive tactics does not appear to have been a material issue in this case, as there is no dispute that he received, at a minimum, the same defensive tactics training as other similarly situated agency employees. As a result, EEDR cannot conclude that any factual error in the decision with regard to the grievant's knowledge of defensive tactics, if such error exists, impacted the outcome of this case.

In summary, determinations of credibility as to disputed facts are precisely the sort of findings reserved solely to the hearing officer. 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. While the grievant may disagree with the hearing officer's decision, there is nothing to indicate that her consideration of the evidence was in any way unreasonable or not based on the actual evidence in the record. Because the hearing officer's findings in this case are based upon evidence in the record and the material issues of the case, EEDR cannot substitute its judgment for that of the hearing officer with respect to those findings. The hearing officer has based her decision on the facts in the record and, accordingly, EEDR is unable disturb the hearing decision on the bases discussed above.

Mitigation

Finally, the grievant challenges the hearing officer's decision not to mitigate the agency's disciplinary action. Specifically, he argues that the issuance of a Group III Written Notice here "exceeds the limits of reasonableness" because "[t]he matter was over in seconds," the incident "was a roadside confrontation on a busy Interstate highway[,] and the majority of the witnesses stated that the force was reasonable and justified."

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[46] *See, e.g.*, EDR Ruling No. 2014-3884.
[47] Hearing Decision at 2.
[48] Hearing Recording at Track 6, 00:51-1:49 (testimony of grievant).
[49] Va. Code § 2.2-3005.1(C) (emphasis added).
[50] *Grievance Procedure Manual* § 5.9 (emphasis added).

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EEDR]."[51] The *Rules for Conducting Grievance Hearings* (the "*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[52] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[53]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[54] EEDR will review a hearing officer's mitigation determination for abuse of discretion,[55] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

In this instance, the hearing officer found no mitigating circumstances that would support a decision to reduce the discipline issued by the agency.[56] A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[57] Even considering those arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EEDR is unable to find that the hearing officer's determination regarding mitigation was

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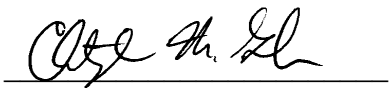
[51] Va. Code § 2.2-3005(C)(6).
[52] *Rules for Conducting Grievance Hearings* § VI(A).
[53] *Id.* § VI(B)(1).
[54] The Merit Systems Protection Board's approach to mitigation, while not binding on EEDR, can be persuasive and instructive, serving as a useful model for EEDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[55] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*
[56] Hearing Decision at 18-19.
[57] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).

in any way unreasonable or not based on the evidence in the record.[58] As such, EEDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EEDR declines to disturb the hearing officer's decision.[59] 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.[60] 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.[61] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[62]



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[58] *See, e.g.*, EDR Ruling Number 2017-4407; EDR Ruling No. 2015-4096.
[59] To the extent this ruling does not address any specific issue raised in the grievant's request for administrative review, EEDR has thoroughly reviewed the hearing record and determined that there is no basis to conclude the hearing decision does not comply with the grievance procedure or state or agency policy such that remand is warranted in this case.
[60] *Grievance Procedure Manual* § 7.2(d).
[61] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[62] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).