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ADMINISTRATIVE REVIEW

In the matter of the Department of Juvenile Justice
Ruling Number 2020-5060
March 17, 2020

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)¹ administratively review the hearing officer’s decision in Case Number 11430. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The relevant facts in Case Number 11430, as found by the hearing officer, are as follows:²

The Department of Juvenile Justice [the “agency”] employed Grievant as a Resident Specialist. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. A and Grievant were working in the Unit on June 26, 2019. The Resident was also in the Unit that day.

The Unit had an open area surrounded by doorways. Most of the doorways opened into a resident’s room. One of the doorways opened into the shower room.

The Unit had video cameras showing activity in the open area but not inside the shower room. The cameras were hung on the wall or ceiling with a wide angle view. The cameras did not record continuous motion.

On June 26, 2019, the Resident went to the middle of the open area and sat down at a table. Mr. A and Grievant asked the Resident several times to return to his room. He refused to return to his room. When a resident refused to comply with

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² Decision of Hearing Officer, Case No. 11430 (“Hearing Decision”), February 12, 2020, at 2-5 (citations omitted).

an employee's instruction, staff were to remove items from the resident's room to "sanitize" the room.

Mr. A placed his right foot on a chair to adjust his shoe and shoe laces. Grievant began removing items from the Resident's room. The Resident went to the doorway between the open area and the shower room. He stood in the doorway facing the open area. Mr. A stood facing the Resident talking to him. Mr. A moved away from the Resident as the Resident remained in the shower room doorway. Mr. A returned to the chair and placed his left foot on the chair to adjust the laces on his left shoe. He continued to talk to the Resident. Grievant continued to remove items from the Resident's room. A pile of the Resident's belongings were in front of the open door to his room. Mr. A moved those items with his foot toward the center of the open room.

The open door to the Resident's room was to the Resident's left as he stood in the shower room doorway. The door was a heavy metal door that when closed could be locked to prevent the Resident from leaving the room. As Grievant was exiting the Resident's room, the Resident used his left arm to grab the door edge and swing it in order to close the door. The Resident's objective was to close Grievant inside the room. The door hit Grievant on her left elbow causing her pain. Mr. A observed the door hit Grievant. Mr. A and Grievant moved quickly in the direction of the Resident. Their objective was to restrain the Resident.

The Resident moved backwards into the shower room as Mr. A and Grievant moved towards him. The Resident punched Grievant in the forehead. The floor in the shower room was wet. Grievant fell to the floor. The Resident fell to his back but his left leg was on top of Grievant. Grievant was on her left side facing away from the Resident. The Resident's left leg was on top of Grievant's right side. Grievant attempted to get out from under the Resident as the Resident continued to kick and punch toward Mr. A and Grievant. Mr. A remained standing but jumped back and forth to avoid being kicked by the Resident. The Resident was able to kick Mr. A several times. He bent over to attempt to turn the Resident so that the Resident could be restrained.

At some point, Grievant was able to use her right hand to grab her radio and announce an emergency. This signaled numerous staff to come to the Unit to help.

A supervisor, Ms. A, was the first to enter the shower room. She observed Mr. A to her left, the Resident in front of her and Grievant to her left. The Resident was on his back trying to kick Mr. A and Grievant. The Resident was saying "Get off of me." Mr. A was trying to get the Resident to turn over so that the Resident could be restrained. Ms. A did not observe Mr. A kicking the Resident. She did not observe Grievant kicking the Resident. Grievant said, "He hit me!" Ms. A turned her focus to Grievant. Ms. A observed Grievant as "elevated" and "agitated." Grievant was furious and cursing. Ms. A told Grievant, "You need to leave and get out." Ms. A instructed another staff member to remove Grievant from the shower area. Mr. C "picked [Grievant] off the floor and escorted her off of the unit." He

did so “to get her away from the incident.” Another employee assisted Mr. C. Grievant was “crying profusely” as she left the Unit.

Grievant went to the emergency room after the incident. Her leg was injured where the Resident fell on her leg.

A medical examination of the Resident showed he had a scratch on the left side of his neck and “pectoral area.”

The Resident told staff that Grievant kicked him. The Agency assigned the Investigator to review the Resident’s allegation.

The Investigator viewed a video of the incident. He believed Mr. A had kicked the Resident. His interview questioning appeared directed at confirming his belief.

The Investigator interviewed Mr. A on July 7, 2019 and on July 11, 2019. The Investigator asked: What was happening? What was going on? Mr. A replied, “[t]oday I don’t recall exactly what was happening. But based on the marks on my legs I was trying to prevent him from bruising my legs any further since he was doing a lot of kicking.”

On July 11, 2019, the Investigator interviewed Mr. A for the third time. The Investigator asked, “Did you punch [the Resident] more than five time[s] or less than five times? Mr. A replied, “I didn’t punch [the Resident] at all. The Investigator asked, “Did you kick [the Resident] more than five times or less than five times? Mr. A replied, “I didn’t kick [the Resident] at all.

On July 11, 2019, the Investigator interviewed Grievant. Grievant described the incident. The Investigator asked, “But I didn’t hear what you did. I need to hear what you did. Did you throw any punches? Grievant replied, “No. *** I’m trying to push him off but he [was] steady kicking. *** I don’t know what he was thinking but I never kicked him. I never kicked him. He might have felt like I was kicking because I was trying to push him off of me. But I never kicked him.”

The Investigator asked, “Did you ever punch him? Grievant answered, “I don’t recall.” The Investigator said, “At the end of the day, I am not trying to get you to say something you didn’t do. But at the same time, this is not a time to pretend nothing happened if you did something.” The Investigator added, “Let me ask you one more time then we will just go through the video. Could you have hit him? Grievant said, “I, probably, yes.”

The Investigator asked, “Would you say you struck him more than five or less than five times?” Grievant answered, “Probably about five.” The Investigator asked, “Would you say you kicked him more than five times or less than five times?” Grievant answered, “Less than five times.”

The Investigator as asked, “Your partner [Mr. A] what [is] he doing? Grievant asked, “Is that him standing there?” The Investigator said yes. Grievant said, “Yes. I see him but I can’t tell what he [is] doing.” The Investigator asked, “What [does] it look like to you? What [does] it look like?” Grievant answered, “To me it [looks] like, to be honest it [looks] like he doing like I don’t know, like I don’t know it’s like he ...” The Investigator interrupted Grievant and said, “kicking or stomping, kicking or stomping!”

The Investigator asked, “How many times would you say with [Mr. A], punched, more than five or less than five?” Grievant said, “Oh, I don’t even know. I don’t even want to guess, because I don’t even know.” The Investigator insisted, “Are you saying more than five or less than five?” Grievant answered, “I would say probably more than five, maybe about six.” The Investigator asked, “Now with kicks, how many time would you say [Mr. A] kicked, more than five or less than five? Grievant replied, “If I had to guess, I don’t even want to guess because I don’t want to be wrong, I don’t want to lie to you. If I had to guess, I would say, I don’t know.” The Investigator said, “If you think he kicked less than five say less than five; if you think more than five say more than five; five is the number that I use.” Grievant said, “I would say less.”

On August 30, 2019, the grievant was issued a Group III Written Notice with removal for assaulting the Resident during a physical restraint.³ The Written Notice cited the agency’s policies SOP 218, *Use of Force and Mechanical Restraints*, and Vol I-1.2-01, *Staff Code of Conduct*.⁴ The grievant timely grieved the disciplinary action and a hearing was held on December 16, 2019.⁵ In a decision dated February 12, 2020, the hearing officer concluded that the evidence was sufficient to support the disciplinary action.⁶ The grievant now appeals the hearing decision to EDR.

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”⁷ 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 either party; the sole remedy is that the hearing officer correct the noncompliance.⁸ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

³ Agency Ex. A.

⁴ *See id.*; Agency Exs. D, E.

⁵ *See* Hearing Decision at 1.

⁶ *Id.* at 5-7.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ *See Grievance Procedure Manual* § 6.4(3).

⁹ Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

Consideration of Evidence

In her request for administrative review, the grievant argues that she never told the agency's investigator that she punched or kicked the Resident.¹⁰ She further contends that the investigator's conclusions were flawed and that other evidence was inconsistent with the Resident having been kicked or punched.¹¹ Instead, she claims, she may have used her leg in self-defense to move the Resident off her while they were both on the floor, which she asserts would not have been a policy violation.¹²

Hearing officers are authorized to make "findings of fact as to the material issues in the case"¹³ and to determine the grievance based "on the material issues and the grounds in the record for those findings."¹⁴ 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.¹⁵ 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.¹⁶ 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, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the hearing officer determined that the "Grievant admitted to striking the Resident about five times and kicking him fewer than five times."¹⁷ These admissions, he found, were "sufficient to conclude that Grievant admitted to physical violence against the Resident."¹⁸ While the grievant may dispute the hearing officer's determination, it is based upon evidence in the record, specifically the grievant's recorded statements to the investigator that were played during the hearing.¹⁹ Notwithstanding the hearing officer's view that the investigator asked questions designed to induce a confession, the hearing officer nevertheless determined that the grievant's statements were credible as to whether she engaged in the misconduct charged. The hearing officer had the authority and duty to determine the significance of her statements and to weigh them accordingly.²⁰ Conclusions as to the credibility of witnesses are precisely the kinds of

¹⁰ Request for Administrative Review at 1-2.

¹¹ *Id.* at 2-3.

¹² *Id.*

¹³ Va. Code § 2.2-3005.1(C).

¹⁴ *Grievance Procedure Manual* § 5.9.

¹⁵ *Rules for Conducting Grievance Hearings* § VI(B).

¹⁶ *Grievance Procedure Manual* § 5.8.

¹⁷ Hearing Decision at 6.

¹⁸ *Id.*

¹⁹ Hearing Recording at 1:30:30-1:31:15.

²⁰ *See id.* During a recording of the investigatory interviews played during the hearing, the investigator can be heard asking the grievant: "Would you say you struck him more than five or less than five times?" The grievant answered, "about five." The investigator then said: "I know you kicked him. Would you say you kicked him more than five or less than five times?" The grievant answered, "less." The hearing officer could reasonably conclude that these answers described actual events, rather than hypotheticals as the grievant subsequently claimed. Even if the hearing officer had found that the grievant's "kicks" were justified by self-defense, record evidence supports his conclusion that striking the Resident about five times constituted misconduct under agency policy. *See Agency Ex. D.*

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.²¹

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.²² 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.²³ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.²⁴



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²¹ See, e.g., EDR Ruling No. 2020-4976.

²² *Grievance Procedure Manual* § 7.2(d).

²³ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

²⁴ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).