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**ADMINISTRATIVE REVIEW**

In the matter of the Department of Juvenile Justice  
Ruling Number 2020-5061  
March 17, 2020

The Department of Juvenile Justice (the “agency”) has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)<sup>1</sup> administratively review the hearing officer’s decision in Case Number 11429. For the reasons set forth below, EDR must remand the decision for clarification and/or reconsideration.

FACTS

The relevant facts in Case Number 11429, as found by the hearing officer, are as follows:<sup>2</sup>

The Department of Juvenile Justice employed Grievant as a Resident Specialist. He had been employed by the Agency for approximately 6 years. Grievant was 51 years old. No evidence of prior active disciplinary action was introduced during the hearing.

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

The Unit has 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.

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<sup>1</sup> 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.

<sup>2</sup> Decision of Hearing Officer, Case No. 11429 (“Hearing Decision”), February 12, 2020, at 2-5 (citations omitted).

On June 26, 2019, the Resident went to the middle of the open area and sat down at a table. Grievant and Ms. R asked the Resident several times to return to his room. He refused to return to his room. When a resident refused to comply with an employee's instruction, staff were to remove items from the resident's room to "sanitize" the room.

Grievant placed his right foot on a chair to adjust his shoe and shoe laces. Ms. R 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. Grievant moved close to the Resident and stood facing the Resident talking to him. Grievant moved away from the Resident as the Resident remained in the shower room doorway. Grievant 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. Ms. R continued to remove items from the Resident's room. Some of the Resident's belongings were in a pile in front of the open door to his room. Grievant 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 Ms. R 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 Ms. R inside the room. The door hit Ms. R on her left elbow causing her pain. Grievant observed the door hit Ms. R. Grievant and Ms. R moved quickly in the direction of the Resident. Their objective was to restrain the Resident.

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

At some point, Ms. R 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 Grievant to her left, the Resident in front of her and Ms. R to her left. The Resident was on his back trying to kick Grievant and Ms. R. The Resident was saying "Get off of me." Grievant was trying to get the Resident to turn over so that the Resident could be restrained. Ms. A did not observe Grievant kicking the Resident. She did not observe Ms. R kicking the Resident. Ms. R said, "He hit me!" Ms. A turned her focus to Ms. R. Ms. A observed Ms. R as "elevated" and "agitated." Ms. R was furious and cursing. Ms. A told Ms. R, "You need to leave and get out." Ms. A

instructed another staff member to remove Ms. R from the shower area. Mr. C “picked [Ms. R] 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. Ms. R was “crying profusely” as she left the Unit.

Ms. R 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 Grievant had kicked the Resident. His interview questioning appeared directed at confirming his belief.

The Investigator interviewed Grievant on July 7, 2019 and on July 11, 2019. The Investigator asked: What was happening? What was going on? Grievant 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 Grievant for the third time. The Investigator asked, “Did you punch [the Resident] more than five time or less than five times?” Grievant 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?” Grievant replied, “I didn’t kick [the Resident] at all.”

On July 11, 2019, the Investigator interviewed Ms. R. Ms. R 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?” Ms. R 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? Ms. R 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? Ms. R said, “I, probably, yes.”

The Investigator asked, “Would you say you struck him more than five or less than five time[s]?” Ms. R answered, “Probably about five.” The Investigator asked, “Would you say you kicked him more than five times or less than five times?” Ms. R answered, “Less than five times.”

The Investigator [] asked, “Your partner [Grievant] what [is] he doing?” Ms. R asked, “Is that him standing there?” The Investigator said yes. Ms. R 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?” Ms. R 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 Ms. R and said, “kicking or stomping, kicking or stomping!”

The Investigator asked, “How many times would you say with [Grievant], punched, more than five or less than five?” Ms. R 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?” Ms. R answered, “I would say probably more than five, maybe about six.” The Investigator asked, “Now with kicks, how many times would you say [Grievant] kicked, more than five or less than five? Ms. R 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.” Ms. R said, “I would say less.”

On September 10, 2019, the grievant was issued a Group III Written Notice with removal for using excessive force to restrain the Resident.<sup>3</sup> 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*.<sup>4</sup> The grievant timely grieved the disciplinary action, and a hearing was held on December 10, 2019.<sup>5</sup> In a decision dated February 12, 2020, the hearing officer concluded that the evidence was not sufficient to support the disciplinary action.<sup>6</sup> The agency 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 . . . .”<sup>7</sup> 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.<sup>8</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>9</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency argues that, in reversing the Group III Written Notice, the hearing officer erred by failing to consider whether the evidence supported formal discipline at a level lower than Group III and by discounting the findings of the agency’s

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<sup>3</sup> Agency Ex. A.

<sup>4</sup> *See id.*; Agency Exs. D, E.

<sup>5</sup> *See* Hearing Decision at 1.

<sup>6</sup> *Id.* at 5-7.

<sup>7</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>8</sup> *See Grievance Procedure Manual* § 6.4(3).

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

investigator.<sup>10</sup> The agency also requests that the evidentiary record be re-opened to consider testimony by the grievant, given in a different proceeding subsequent to his hearing.<sup>11</sup>

*Proof of Misconduct/Level of Discipline*

The agency contends that, while the hearing officer did not find sufficient evidence to support the most serious misconduct charged by the Group III Written Notice, he failed to consider whether the evidence supported other charged misconduct. Specifically, the agency argues that the Written Notice effectively charges unsatisfactory performance and failure to follow policy by citing requirements to use “only the minimal amount [of force] necessary” to control a resident<sup>12</sup> and to set a positive example for juveniles in the agency’s care.<sup>13</sup> The Written Notice explained that the grievant’s restraint of the Resident “turned into excessive force” under agency policies.<sup>14</sup>

The hearing decision does not discuss whether the grievant engaged in misconduct that was not assault but that could nevertheless be a basis for discipline under the agency’s use-of-force and/or code-of-conduct policies.<sup>15</sup> The hearing officer asserted that the grievant “was disciplined for kicking and punching that occurred in the shower room”<sup>16</sup> and found that the evidence was not sufficient to prove those acts.<sup>17</sup> However, the agency presented multiple witnesses who testified about other aspects of the grievant’s conduct that may violate the policy provisions listed on the Written Notice.

For example, agency witnesses testified that the grievant and Ms. R should not have charged the Resident in the shower.<sup>18</sup> Based on his review of the video footage and the investigation of the incident, the Superintendent concluded that the grievant and Ms. R “did not use the correct amount of force. . . . They didn’t have to go to the floor; they didn’t have to use excessive force here.”<sup>19</sup> He further testified that the agency’s use-of-force policy, by requiring employees to use only the minimum amount of force necessary, means that staff must use de-escalation tactics first if possible.<sup>20</sup>

In sum, some evidence in the record could potentially support a charge that the grievant’s pursuit of the Resident into the shower area violated the agency’s requirements to minimize the use of force, de-escalate conflict if possible, and set a positive example for juveniles. Although a hearing officer’s mere silence on an issue is not necessarily grounds for remand, given the decision’s emphasis on hitting and kicking it is not clear that the hearing officer considered the other forms of misconduct charged on the Written Notice, about which the agency presented evidence at the hearing. Therefore, EDR remands the hearing decision for clarification and/or

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<sup>10</sup> Request for Administrative Review at 2-3.

<sup>11</sup> *Id.* at 1. While the grievant has asserted on rebuttal that the agency’s Request for Administrative Review is retaliatory, EDR perceives nothing improper in the agency’s request.

<sup>12</sup> Agency Ex. D, at 2.

<sup>13</sup> Agency Ex. E, at 3, 4.

<sup>14</sup> Agency Ex. A, at 1.

<sup>15</sup> *See* Agency Exs. D, E.

<sup>16</sup> Hearing Decision at 5.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> Hearing Recording at 20:35-26:40 (testimony of Deputy Director of Residential Services), 40:20-40:45 (testimony of Superintendent).

<sup>19</sup> *Id.* at 41:40-42:05.

<sup>20</sup> *Id.* at 42:05-42:33; *see* Agency Ex. D, at 2-3.

reconsideration as to whether the evidence supports a finding that the grievant's behavior other than alleged hitting and kicking constituted misconduct under agency policies cited by the Written Notice.

Where a hearing officer sustains fewer than all of the agency's charges, he or she must reduce the discipline to the maximum reasonable level sustainable under law and policy so long as the agency has not indicated that it desires a lesser penalty to be imposed on fewer charges.<sup>21</sup> Accordingly, should the hearing officer determine on remand that the grievant did engage in charged misconduct, the decision must sustain the Written Notice at the maximum reasonable level for any offense upheld.

### *Investigation Evidence*

The agency also contends that the hearing officer abused his discretion by disregarding both the conclusions of its investigator and Ms. R's statements to the investigator about the grievant's actions. Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>22</sup> and to determine the grievance based "on the material issues and the grounds in the record for those findings."<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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, after reviewing a video recording of the incident, the hearing officer disagreed with the agency investigator's conclusion that the recording showed the grievant "kicking and stomping" on the Resident.<sup>26</sup> The hearing officer also noted that "[m]any of the Investigator's question[s] presupposed that Grievant and Ms. R had kicked and punched the Resident. . . . He essentially induced the response that matched his assumption regarding what happened."<sup>27</sup> The hearing officer further found that, during the incident, Ms. R "was so angry and upset that she could not remember some portions of the incident."<sup>28</sup> Thus, the hearing officer stated that her "ambivalent statements to the Investigator along with her inability to view Grievant's actions

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<sup>21</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1). Here, the agency's Request for Administrative Review makes clear that it seeks to maintain the Written Notice at the Group III level.

<sup>22</sup> Va. Code § 2.2-3005.1(C).

<sup>23</sup> *Grievance Procedure Manual* § 5.9.

<sup>24</sup> *Rules for Conducting Grievance Hearings* § VI(B).

<sup>25</sup> *Grievance Procedure Manual* § 5.8.

<sup>26</sup> Hearing Decision at 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 7.

renders unreliable the Investigator's and the Agency's conclusion that Grievant hit and/or kicked the Resident."<sup>29</sup>

While the agency may dispute the hearing officer's view of the investigation and the credibility of the grievant, it is within the hearing officer's discretion to make such credibility determinations and weigh the evidence accordingly. In this case, the hearing officer, in his discretion, found that the investigator's approach to interviews undermined the reliability of the witness statements elicited. Similarly, the hearing officer had discretion to reject the agency's view that the grievant lied (to the investigator and at the hearing) in order to save his job,<sup>30</sup> especially in the absence of other reliable evidence tending to contradict the grievant's account. 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. 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.<sup>31</sup> Therefore, on remand, the hearing officer need not reconsider his evaluation of the agency's investigation.

#### *Newly Discovered Evidence*

Finally, the agency contends that the grievant's testimony given in a subsequent hearing on Ms. R's related but separate grievance is newly discovered evidence and should be admitted into the record in this matter. Because of the need for finality, evidence not presented at hearing cannot be considered upon administrative review unless it is "newly discovered evidence."<sup>32</sup> Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.<sup>33</sup> However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that

(1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.<sup>34</sup>

At Ms. R's subsequent hearing, the grievant testified that he did not initially get down on the floor to assist Ms. R in her struggle with the Resident because he was concerned about re-

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<sup>29</sup> *Id.*

<sup>30</sup> See Request for Administrative Review at 3.

<sup>31</sup> See, e.g., EDR Ruling No. 2020-4976.

<sup>32</sup> *Rules for Conducting Grievance Hearings* § IV(G); Cf. *Mundy v. Commonwealth*, 11 Va. App. 461, 480-81, 390 S.E.2d 525, 535-36 (1990), *aff'd en banc*, 399 S.E.2d 29 (Va. Ct. App. 1990) (explaining the newly discovered evidence rule in state court adjudications); see EDR Ruling No. 2007-1490 (explaining the newly discovered evidence standard in the context of the grievance procedure).

<sup>33</sup> See *Boryan v. United States*, 884 F.2d 767, 771-72 (4th Cir. 1989) (citations omitted).

<sup>34</sup> *Id.* at 771 (quoting *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)).

injuring his foot, on which he had recently had surgery.<sup>35</sup> He further testified that, although he had “led [his] doctor to believe” that he was able to return to work with no restrictions, he still felt the need to be “precautious” about his foot at work.<sup>36</sup> The agency contends that this testimony, in addition to undermining the grievant’s overall credibility, tends to show that he failed to “perform all [his] duties professionally and competently” as a result of providing false information to his doctor.<sup>37</sup> The agency contends that this offense was within the scope of the Group III Written Notice that was the subject of the hearing in this matter.<sup>38</sup>

EDR does not find that the grievant’s later testimony constitutes newly discovered evidence that can be considered in this case. First, the testimony was not “in existence at the time of the hearing”<sup>39</sup> but instead was given at a later date. Second, the agency heard the new testimony on December 16, 2019, well before the hearing officer rendered his decision in this case on February 12, 2020.<sup>40</sup> Third, it is unclear how the grievant’s testimony about being reluctant to get down on the floor would be material to the issue of whether the grievant assaulted the Resident or, more generally, used excessive force as charged on the Written Notice.<sup>41</sup> Thus, the new testimony appears to be, at most, impeaching, and not evidence likely to produce a new outcome if the hearing record was re-opened for consideration of additional evidence. Because the elements for the admission of newly discovered evidence have not been met, EDR perceives no basis to re-open the evidentiary record upon remand.

### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR remands this case to the hearing officer for further consideration of the evidence in the record. The hearing officer is directed to issue a remand decision considering whether the evidence supports a conclusion that the grievant engaged in misconduct other than assault under the agency’s policies and, if so, what level of discipline would be the maximum reasonable under the circumstances.

Both parties will have the opportunity to request administrative review of the hearing officer’s reconsidered decision on any new matter addressed in the remand decision (*i.e.* any matters not resolved by the original decision). Any such requests must be **received** by EDR **within 15 calendar days** of the date of the issuance of the remand decision.<sup>42</sup> 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.<sup>43</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction

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<sup>35</sup> Hearing Recording, Case No. 11430, December 16, 2019, at 2:32:35-2:33:45, 2:44:55-2:46:05.

<sup>36</sup> *Id.*

<sup>37</sup> Request for Administrative Review at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Rules for Conducting Grievance Hearings* § IV(G).

<sup>40</sup> *See* Hearing Decision at 1.

<sup>41</sup> The agency appears to argue that the grievant’s later testimony was probative of the offense of not properly restraining the Resident. However, even accepting that interpretation of the testimony, the agency’s description of the offense on the Group III Written Notice focuses on *excessive* force. *See* Agency Ex. A, at 1. Thus, it does not reasonably put the grievant on notice that discipline was issued for not getting down onto the floor to use force sooner.

<sup>42</sup> *See Grievance Procedure Manual* § 7.2.

<sup>43</sup> *Id.* § 7.2(d).



in which the grievance arose.<sup>44</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>45</sup>



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<sup>44</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>45</sup> *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).