Issue: Administrative Review of Hearing Officer's Decision in Case No. 9129; Ruling Date: October 19, 2009; Ruling #2010-2395; Agency: Department of Corrections; Outcome: Hearing Officer in Compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2010-2395
October 19, 2009

The Department of Corrections ("DOC" or the "agency") has requested that this Department ("EDR") administratively review the hearing officer's decision in Case Number 9129. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

On February 27, 2009, the grievant was issued a Group III Written Notice with demotion and reduction in pay along with a 30-day suspension for alleged use of excessive force on an inmate. The grievant timely grieved the discipline and a grievance hearing occurred on July 18, 2009. In his July 27, 2009 hearing decision, the hearing officer found the following facts:

> The Agency employed Grievant as a sergeant who had 22 years of service with no active disciplinary actions. The Agency agreed that the Grievant's history of annual evaluations through the years showed that he either met or exceeded expectations.
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> The Agency's representative, the facility warden, testified that from an Agency internal investigation she learned of founded charges against the Grievant, including assault and battery of an inmate and violation of Agency policy for humane treatment of offenders. The Agency's investigation report was admitted as Agency's Exh. 5, and the lead investigator testified at the grievance hearing. The complaining inmate, W, and other inmates interviewed were not presented as witnesses at the grievance hearing.
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> The internal investigation was initiated after inmate W wrote complaint letters to the Agency and other outside officials, alleging that he was assaulted by the Grievant, while another sergeant ("E") stood by without intervening. W was not called to testify at this grievance hearing.

W's complaints are established through his written letters and interviews. W said that the Grievant and E removed him from his second floor cell with instructions to escort him to the medical unit for a scheduled appointment. W asserted that the Grievant, after putting W in hand and leg restraints, became aggressive with W and, when W questioned the Grievant about the forcefulness, the Grievant refused to take W to his medical appointment. W asserts that the Grievant then aggressively and forcefully lead W back up the stairs and forcefully threw W back into his cell. W said because his hands and ankles were still secured in metal restraints (hands behind his back), he lost his balance and fell forward, causing a bruise under his left eye and scrapes on the back of his ankles from being rushed up the stairs with the leg restraints still on. Agency's Exh. 16 (pictures). According to W, the Grievant refused to escort him to his medical appointment.

The inmate W's grievance (complaint) against the Grievant (Agency Exh. 5, p. 126) states that it was written by W while his hands were restrained behind his back. None of the witnesses explained how W could have written his complaint while his hands were restrained behind his back. The handwriting does not appear unbalanced or irregular, but rather neat and comparable to W's other handwriting examples. W refused to have his hand restraints removed when he was returned to his cell, and he complained that he was forced to eat lunch with his hands bound behind him.

The Grievant, sergeant E who was with him at the time, and other witnesses testified that the inmate did not have the leg restraints on when he was being escorted up the steps back to his cell. The Grievant testified that W was noncompliant with repeated efforts to apply the required leg restraints so that W could be escorted to his scheduled medical appointment. The Grievant considered W's conduct tantamount to refusal of the escort to the medical unit, and, thus, he returned W to his cell without the leg restraints on. The Grievant agreed that W refused to have his hand cuffs removed. The Grievant denied that he assaulted or battered W, and insisted that the leg restraints were never applied to W because of his noncompliant behavior that prevented the orderly application of the leg restraints. It was for this reason, according to the Grievant, that he considered W as refusing his medical appointment. Sergeant E testified similarly, but said he would have been more tolerant of W's noncompliance and would have further tried to coax W into compliance.

The Agency's nurse examined W on the evening following the incident and noted an open area to left and right Achilles and left eye slightly discolored. Agency Exh. 13. The nurse examined the Agency's photographs taken on April 8, 2008, (Agency Exh. 16) and testified that

her observation was of a less noticeable injury under W's left eye than shown in the photograph.

The control booth officer and floor officer at the time observed the parties at the time and did not recall seeing anything unusual about the way the Grievant handled or escorted W from and back to his cell.

The Agency's lead investigator concluded that Grievant's history of the events varied from the time of the incident in March 2008 and when he was interviewed in December 2008. The Grievant testified that he asked for a copy of his March incident report when interviewed in December, but his request was refused. The Grievant testified that his memory of specific details of the incident had faded during the nine months from March to December.

In reaching his conclusions, the Agency's chief investigator was unaware of and did not consider W's disciplinary record while incarcerated. W's record shows that he has had multiple disciplinary incidents, including disobeying direct orders, fighting, and assaults, with one instance of assault on March 14, 2008 (a few days before this incident). Agency Exh. 17. The credibility of W is necessarily a central aspect of the Agency's case, as W was the only witness who could establish his slight injuries were inflicted by the Grievant.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the

> disciplinary action or aggravated circumstances to justify the disciplinary action."
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> Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant and witnesses supporting his version of events to be credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of the witnesses; they cannot be cross-examined, nor their recollections probed. While the Agency may point to certain corroborating information to support its conclusions, there are just as many inconsistencies. The Agency has the burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other.
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> It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions her agency presented to her. The Agency also showed appropriate mitigation in levying the discipline. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony, and that of supporting witnesses, to be at least as credible as the contrary information and conclusions charged by the internal investigation. Necessarily, the escorting of an inmate by a corrections officer is the use of force, and the evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant violated applicable policy. For this reason, I find that the Agency's case rises no higher than equipoise and does not meet its burden of establishing the charged misconduct.[1]

Based on the above facts and related conclusions, the hearing officer reversed the Group III Written Notice and associated sanctions, restoring the grievant's rank, benefits, and back pay.[2] The agency subsequently sought reconsideration of the hearing decision. In his August 25, 2009 Reconsideration Decision, the hearing officer upheld his earlier decision.[3] The agency now seeks an administrative review decision from this Department.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final

[1] Decision of Hearing Officer, Case No. 9129, issued July 27, 2009 ("Hearing Decision") at 3-5.
[2] *Id.* at 6.
[3] Reconsideration Decision of the Hearing Officer, Case No. 9129, issued August 25, 2009.

decisions … on all matters related to procedural compliance with the grievance procedure."[4] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[5]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[6] and to determine the grievance based "on the material issues and grounds in the record for those findings."[7] 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.[8] 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.[9] 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, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the agency's appeal challenges the factual findings and related conclusions of the hearing officer's decision. The agency is fundamentally contesting the weight and credibility that the hearing officer accorded to the testimony of witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. This Department has long held that such determinations are entirely within the hearing officer's authority when supported by record evidence as is the case here.

The agency asserts that the grievant has presented "no facts." However, this assertion is without merit. The grievant testified at hearing as did Sergeant E.[10] The agency asserts that Sergeant E was a "co-conspirator" who has changed his story several times in his written statements. A review of the hearing recording reveals testimony by Sergeant E including (i) repeated statements that the grievant did nothing wrong and violated no policies, and (ii) an explanation of why there are apparent variances in his statements.[11] Moreover, the hearing officer finds in his decision that "[b]ased on the manner, tone, and demeanor of the witnesses," I find that the Grievant and witnesses

[4] Va. Code § 2.2-1001(2), (3), and (5).
[5] *Grievance Procedure Manual* § 6.4.
[6] Va. Code § 2.2-3005.1(C).
[7] *Grievance Procedure Manual* § 5.9.
[8] *Rules for Conducting Grievance Hearings ("Rules")* § VI(B).
[9] *Grievance Procedure Manual* § 5.8.
[10] At Hearing Tape 5, Side A, counter reading 370, the grievant's testimony begins. At Hearing Tape 1, Side B, at 295, Sgt. E's testimony commences.
[11] Hearing Tape 1, Side B, at 350-357, 432-433, and 439-441; 420-432, respectively.

supporting his version of events to be credible."[12] Determinations such as those relating to credibility are reserved for hearing officers. Importantly, the hearing officer highlights the agency's failure to produce the complaining inmate. Instead, the agency elected to rely on written statements which the hearing officer notes are not subject to cross-examination. We find no error in the hearing officer apparently giving greater weight to the sworn testimony of eye-witnesses who are subject to cross-examination (e.g, the grievant and Sergeant E) than he seemed to place on (i) written statements not subject to cross-examination and (ii) hearsay testimony from non-eyewitnesses.[13] In sum, because there is record evidence to support the findings in the hearing decision, this Department has no basis to disturb the decision.[14]

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided and, if ordered by EDR or DHRM the hearing

[12] Hearing Decision at 5.

[13] An example of how the absence of testimony from the complaining inmate may have been detrimental to the agency's case is possibly reflected by the hearing officer's findings on the credibility of the complainant. The complainant apparently asserted that he wrote his complaint with his hands handcuffed behind him. (Hearing Decision, at 4; Agency Exhibit 5, p. 126.) The agency argued in its Reconsideration Request that the hearing officer erroneously placed emphasis on the issue of how the inmate could have written the complaint with his hands cuffed behind his back. (Reconsidered Decision, at 1.) In his Reconsidered Decision, the hearing officer stated that he considered testimony that the complainant may have stepped through the cuffs, but the hearing officer found that testimony speculative. (*Id.*) Because the complainant had not been called as a witness by the agency, the agency was unable to provide any clarification at hearing through questioning regarding the complainant's statement "I am currently writing this emergency grievance with my hands cuffed behind my back." Moreover, we cannot conclude that hearing officer erred in rejecting the agency's subsequent offer to make the complaining inmate available after the hearing had ended and the decision against the agency had been rendered. The hearing officer correctly concluded that any such testimony could not be considered because it was not newly discovered evidence. *See* EDR Ruling 2007-1490.

[14] The agency also contends that the hearing officer simply substituted his judgment for that of the Warden in this case and that the hearing officer's characterization of the inmate's injuries as "slight" is inconsistent with the agency's mission. First, as to the agency's apparent point that degree of injury is immaterial, we understand and concur. No injury caused by excessive force, no matter how slight, can be tolerated. But the salient issue is not whether an inmate is injured slightly or even at all, but whether the inmate was a victim of excessive force. Here, the hearing officer found that the agency did not meet its burden at hearing to establish by a preponderance of evidence that the grievant used excessive force. It is true that the hearing officer found that it was "reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the conclusions her agency presented to her." (Hearing Decision at 5.) (Emphasis added.) However, while the Warden's action may have been reasonable under the circumstances known to her at the time, the agency always bears the burden of showing at hearing that the employee (i) engaged in the behavior described in the Written Notice, and (ii) the behavior constituted misconduct. *See "Rules"* § VI(B). Here, the hearing officer simply found that the agency did not meet this burden of proof. Such a finding is not a substitution of judgment for that of the Warden. If anything, the hearing officer appears to affirm the Warden's judgment in the face of the internal investigation conclusions presented to her.

officer has issued a revised decision.[15] 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.[16] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[17]

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Claudia T. Farr
Director

[15] *Grievance Procedure Manual* § 7.2(d).
[16] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[17] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).