

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9528; Ruling
Date: May 17, 2011; Ruling No. 2011-2947; Agency: Department of Juvenile
Justice; Outcome: Hearing Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Number 2011-2947
May 17, 2011

The grievant has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 9528. For the reasons set forth below, this Department finds no reason to disturb the hearing officer's decision in this case.

FACTS

The facts and related conclusions of this case, as set forth in the hearing decision in Case No. 9528 are as follows:

On October 18, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for violating the Agency's Use of Force policy. On October 18, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for a decision of Founded made as part of a local Child Protected Services investigation.¹

* * *

The Department of Juvenile Justice employed Grievant as a Senior Juvenile Correctional Officer at one of its Facilities. He began working for the Agency on October 22, 2003. Grievant had prior active disciplinary action. On February 11, 2010, Grievant received a Group II Written Notice of disciplinary action for failure to report to work as scheduled without proper notice. On July 12, 2010, Grievant received a Group II Written Notice of disciplinary action for using obscene or abusive language. On July 29, 2010, Grievant received a Group II Written Notice for failing to confiscate a controlled item.

¹ The Group III for the founded complaint to the Child Protected Services was reversed by the hearing officer, not appealed, and therefore not discussed further in this ruling.

The Facility provides a military style environment for juvenile residents. When leaving one building and walking to another building, a group of residents will walk in formation and be escorted by Juvenile Correctional Officers.

Grievant received training regarding use of force with residents and how to implement the Primary Restraint Technique. The Primary Restraint Technique involved getting behind a resident and clasping the resident's arms in a manner that would prohibit the resident from moving.

On August 8, 2010, Grievant and Officer H escorted a group of residents as they walked from one building to another inside the Facility. Resident K began to "horseplay" with Resident L by hitting Resident L. Grievant announced on the radio that "he had a resident hitting another resident". With an open hand, Grievant hit Resident K in the back of the head. Officer H instructed Grievant to stop what he was doing. The formation continued walking. Resident K continued to argue with Resident L. Officer H instructed Resident K to stop what he was doing. Grievant then grabbed Resident K by the back of the neck and held him for approximately 10 seconds. After Grievant let go of Resident K's neck, Resident K turned around and punched Grievant in the face with his fist. Grievant was startled by the attack and responded by punching Resident K in the face. Grievant and Resident K continued to hit each other until Grievant was able to use the Primary Restraint Technique to force Resident K to the ground.

* * *

Group III Written Notice -- Use of Force.

Institutional Operating Procedure number 218 governs the Use of Physical Force. The purpose of the policy is to "establish uniform standards governing the use of physical force in controlling wards." Section 218 – 4.1 provides:

Maintaining custody, control and security of wards and the appropriate use of force when necessary is essential to the operation of [the Facility]. The Behavior Management Program can function effectively only when institutional security and orderly control of wards can be maintained. Generally, the use of force is permissible when other lesser alternatives do not reasonably appear sufficient.

Physical force is authorized for self defense, the defense of others, to prevent an escape, to prevent property damage, to protect a youth from harming himself, and to prevent the commission of a crime. Physical force should be used only when other alternatives have failed or appear unsuitable. When it is deemed necessary to

use physical force to control a ward, only the minimal amount of physical force necessary is to be used.

Grievant failed to comply with the Facility's Use of Force policy. Grievant hit Resident K in the back of the head. Grievant did not do so for self-defense, the defense of others, to prevent an escape, to prevent property damage, to protect a youth from harming himself, or to prevent the commission of a crime. No credible evidence was presented to show the Grievant attempted "other alternatives" to control Resident K and those alternatives failed or were unsuitable. After the formation walked a short distance farther, Grievant grabbed the back of Resident K's neck and held him for approximately 10 seconds. Once Grievant let go of Resident K, Resident K punched Grievant and Grievant punched Resident K as well. Grievant failed to comply with the Facility's Use of Force policy when Grievant grabbed the back of Resident K's neck and held him. Grievant also failed to comply with the policy when Grievant punched Resident K in response to Resident K assault. Grievant had received training regarding use of the Primary Restraint Technique. Punching a resident was not a technique authorized by the Agency's Use of Force Training.

Group III offenses include actions that "endanger others in the workplace." Grievant's failure to comply with the Agency's Use of Force policy endangered Resident K and endangered Grievant because his actions increased the risk that Resident K would retaliate against Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action for unauthorized use of force. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant contends that Officer H was untruthful in her description of his behavior. The Hearing Officer closely observed the demeanor of Officer H as she testified. Her testimony was credible. There exists a sufficient factual basis to support the Agency's issuance of the disciplinary action against Grievant.²

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 decisions ... on all matters related to procedural compliance with the grievance procedure."³ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

² Decision of the Hearing Officer in Case No. 9528, issued March 21, 2011 ("Hearing Decision"), at 1-4.

³ Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁴

Findings of Fact

The grievant appears to challenge the hearing decision on the basis of the hearing officer's findings and his determinations regarding the credibility of witnesses. Hearing officers are authorized to make "findings of fact as to the material issues in the case"⁵ and to determine the grievance based "on the material issues and the grounds in the record for those findings."⁶ 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.⁷ 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.⁸

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. Thus, to the extent the grievant is challenging the hearing officer's findings of fact and his weighing of the evidence, such determinations are entirely within the hearing officer's authority.

In this case, there is record evidence that supports the hearing officer's findings that the grievant engaged in the misconduct listed on the Written Notice: violating the agency's use of force policy.⁹ Accordingly, this Department must uphold the hearing officer's finding of fact with respect to this issue.

Perjury

The grievant asserts that one of the witnesses, Officer H, committed perjury at his hearing. This Department has consistently denied party requests for a rehearing or reopening on the basis of alleged perjury at hearing.¹⁰ In denying such requests, we have found Virginia court opinions to be persuasive. Even where there is a claim of perjury and some supporting evidence, Virginia courts have consistently denied rehearing requests arising after a final judgment.¹¹

⁴ *Grievance Procedure Manual* § 6.4.

⁵ Va. Code § 2.2-3005.1(C).

⁶ *Grievance Procedure Manual* § 5.9.

⁷ *Rules for Conducting Grievance Hearings* § VI(B).

⁸ *Grievance Procedure Manual* § 5.8.

⁹ Agency Exhibit 2 and testimony of the Juvenile Corrections Officer H beginning at 14:00.

¹⁰ See e.g., EDR Ruling No. 2006-1383.

¹¹ See, e.g., *Peet v. Peet*, 16 Va. App. 323 (1993); *Jones v. Willard*, 224 Va. 602 (1983).

Those courts reasoned that the original trial (or hearing) was the party's opportunity to cross-examine and impeach witnesses, and to ferret out and expose any false information presented to the fact-finder. Those courts also opined that to allow re-hearings on the basis of perjury claims after a final judgment could prolong the adjudicative process indefinitely, and thus hinder a needed finality to litigation. The grievant's representative availed himself of the opportunity to expose any false testimony through cross-examination.¹² Accordingly, we decline to disturb the decision on this basis.

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 officer has issued a revised decision.¹³ 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.¹⁴ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁵

Claudia T. Farr
Director

¹² Cross-examination beginning at 28:00.

¹³ *Grievance Procedure Manual* § 7.2(d).

¹⁴ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁵ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).