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ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2023-5452
October 5, 2022

The Department of Corrections (the “agency”) has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer’s decision in Case Number 11818. For the reasons set forth below, EDR remands the hearing decision.

FACTS

The relevant facts in Case Number 11818, as found by the hearing officer, are as follows:¹

The [agency] employed Grievant as a Corrections Officer at one of its facilities. Grievant began working for the Agency in April 2020. No evidence of prior active disciplinary action was introduced during the hearing.

On October 8, 2021, the Inmate consumed “spice”, a type of illegal drug that caused him to behave aggressively, erratically, and unpredictably.

At approximately 4:46 p.m. on October 8, 2021, Officer H instructed the Inmate to go to his cell in the Pod, but the Inmate refused. Officer H placed handcuffs on the Inmate so that his hands were behind his back. The Inmate struggled and attempted to get away from Officer H. The Inmate went to the ground and Officer H placed his knee on the Inmate’s back to hold the Inmate down. The Inmate struggled and was able to get out from under Officer H. Officer H tossed the Inmate to the side to keep the Inmate faced down. Officer H kept his knee on the Inmate’s back and he used two hands to hold the back of the Inmate’s left arm down to the floor. The Inmate was not in leg restraints and could freely kick his legs. Even though Officer H was “twice the size” of the Inmate, Officer H had great difficulty in trying to control the Inmate.

¹ Decision of Hearing Officer, Case No. 11818 (“Hearing Decision”), August 18, 2022, at 2-4 (footnotes omitted).

A “10-33” was called over the radio. Grievant and several other Corrections Officers heard the radio call. Grievant understood the call to mean there was an inmate assaulting a staff member. Grievant immediately began moving towards the Pod in order to “help a buddy.”

The Sergeant entered the Pod and ran towards the Inmate. He got down on the floor to Officer H’s left and tried to hold down the Inmate’s legs.

Two K9 Officers entered the room with their dogs and stood in the Pod.

Officer S, Officer 4 and Officer M entered the Pod and went to the Inmate who was being held face down on the floor. Officer S went to the Inmate’s left leg and tried to hold it down. Officer M went to the Inmate’s head and tried to hold down the Inmate’s neck. Officer 4 went to the bottom of the Inmate’s right foot.

Grievant entered the pod. When Grievant observed the Inmate, he did not know that the Inmate was handcuffed. The Inmate’s behavior and movement was consistent with someone who was not handcuffed and someone who clearly was not under control. Grievant did not know whether the Inmate possessed a weapon. Grievant did not know that the Inmate had taken spice. Grievant went to the Inmate’s left side while the Inmate was faced down. Grievant knelt down and used his shin to pin the Inmate’s left arm. Officer S was on Grievant’s right.

Officer S observed that the Inmate was “violently fighting.” As soon as Officer S grabbed the Inmate’s left leg, the Inmate started kicking Officer S. The Inmate kicked Officer S in the face. Officer S said, “He’s kicking watch out!” Officer S yelled, “He got me in the face!” Grievant heard Officer S yelling. Officer S testified that he had already been kicked by the Inmate before Grievant used a knee strike on the Inmate.

The Sergeant yelled for someone to get leg restraints. Officer S tried to cross the Inmate’s legs to keep him from kicking while they attempted to put leg restraints on the Inmate.

Grievant pinned the Inmate’s left arm with Grievant’s shin. The Inmate attempted to roll. The Inmate tried to reach into his pants. As Grievant tried to hold the Inmate down, Grievant struck the Inmate’s left rib area three times with his right knee while telling the Inmate to stop. Grievant’s biggest concern was he did not know if the Inmate had a weapon and the Inmate was trying to get up off the floor. Grievant was concerned the Inmate would injure him or another officer.

Grievant did not know the Inmate was handcuffed. Someone said “make sure he is restrained.” Grievant looked and realized that the Inmate was in handcuffs. Grievant yelled out, “He is handcuffed.” Someone said, “Check them;

make sure they are on there good.” Grievant checked the cuffs to make sure they were on properly.

Sergeant S called for a spit mask. Grievant asked to be relieved since he carried a spit mask. Grievant gave Sergeant S a spit mask and Grievant was no longer involved in the struggle.

Grievant did not intend to hurt the Inmate. Grievant intended to draw the Inmate’s attention so that the Inmate could become compliant.

The Inmate was examined by medical department staff. He was given Narcan to counter his drug use. The Inmate had no injuries.

Officer S left the Facility and went to the Hospital. As a result of the Inmate’s kicks, Officer S may have had a mild concussion. His hand was swollen. His right thumb was sprained and his left ring finger was bent by the Inmate.

The Warden testified that an employee could use a strike if the employee felt a strike was needed to protect himself and others. The Warden testified an employee could use a “disruption technique” to get an inmate to become compliant. The Warden testified he issued disciplinary action because the knee strikes were outside of policy.

On February 24, 2022, the agency issued to the grievant a Group III Written Notice of disciplinary action with removal for using excessive and unreasonable force by “kneeing the inmate [three] times in the rib area.”² The grievant timely grieved the disciplinary action, and a hearing was held on July 29, 2022.³ In a decision dated August 18, 2022, the hearing officer determined that the agency had not met its burden of proof to support its disciplinary action, on grounds that agency policy did not prohibit the use of knee strikes, and the grievant employed them to protect himself and other staff, rather than for any prohibited purpose.⁴ Accordingly, the hearing officer rescinded the Written Notice and ordered the grievant to be reinstated.⁵ The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has 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.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in

² Agency Exs. at 1-3; *see* Hearing Decision at 1.

³ *See* Hearing Decision at 1.

⁴ *Id.* at 6-7.

⁵ *Id.* at 7.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

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

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ 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.¹¹ 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.¹² 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 on 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.

In its request for administrative review, the agency presents several challenges to the hearing decision. Primarily, the agency argues that its policies articulate a significantly narrower authorization for the use of force than the standard applied by the hearing officer, maintaining that the grievant exceeded that authorization. The agency also contends that, contrary to the hearing officer’s conclusions, the grievant’s specific use of knee strikes was not reasonable under the circumstances, regardless of whether or not the inmate sustained injuries as a result.

“Excessive Force” Standard Under Agency Policies

In this case, the Written Notice issued to the grievant charged that he used “excessive and unreasonable force” in using knee strikes against the Inmate.¹³ Under the agency’s Operating Procedure (OP) 420.1, *Use of Force*, “excessive force” is defined as physical force “beyond what is reasonably required to prevent harm or to control a particular situation or that is not justified by the circumstances.”¹⁴ The Written Notice also charged that the grievant had violated OP 135.2, *Rules Governing Employee Conduct with Offenders*, by exceeding “the minimum amount of force necessary to provide appropriate apprehension, intervention, and control as needed . . . to maintain a safe and secure environment.”¹⁵ Based on these standards, the agency essentially had the burden

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ *Rules for Conducting Grievance Hearings* § VI(B).

¹² *Grievance Procedure Manual* § 5.8.

¹³ Agency Exs. at 1.

¹⁴ *Id.* at 609.

¹⁵ *Id.* at 3, 591.

to prove at the hearing that the grievant's knee strikes against the Inmate were not "reasonably required" under the circumstances.¹⁶

As the hearing officer acknowledged, OP 420.1 sets forth employees' duty "to protect others who are threatened by the actions of any facility inmate."¹⁷ Employees may use "all necessary and suitable means to perform these duties, including the use of physical force."¹⁸ Employees may "use as much force as they reasonably perceive necessary to perform their duties and to protect themselves and others from harm."¹⁹ However, "[o]nly the amount of force that is reasonably necessary to overcome resistance, mitigate an incident, or gain control under the circumstances, is permissible."²⁰ In addition, the use of physical force is authorized only for certain purposes, such as defense of people or property and in order "to maintain or regain control, and then only as a last resort."²¹ To assess the appropriate level of force to be deployed in a particular situation, OP 420.1 recognizes the following "[c]ontrolling factors":

- The potential consequences if nothing is done
- The degree of force threatened or used by the inmate . . . , including whether the inmate . . . possesses a weapon that could be used to cause physical injury
- The employee's reasonable perception of the danger of death or serious physical injury
- Any alternatives available to control the situation without the use of force[.]²²

In light of these policy provisions, EDR must conclude that the hearing decision lacks adequate findings as to the material issues presented by the grievance. The hearing officer gave six reasons for not upholding the agency's discipline: (1) agency policy authorized force to compel compliance; (2) knee strikes were not prohibited by policy; (3) knee strikes were not prohibited by training; (4) the purpose of the grievant's knee strikes was to protect himself and others, which was his responsibility; (5) the grievant's purpose was not to harm or punish; and (6) the Inmate was not injured by the knee strikes. We conclude that the hearing officer's articulations of agency policy represented by the first, second, third, and fourth reasons listed in the hearing decision fail to capture and apply the performance standards under which the agency issued the Written Notice.

¹⁶ In its request for administrative review, the agency contends that the hearing officer erred by failing to analyze the grievant's conduct under OP 135.2, which requires employees to use no more than "the minimum necessary force" in engaging with inmates. EDR does not perceive a material distinction between a policy mandate to use "only the amount of force that is reasonably necessary" versus the "minimum necessary force" to achieve a purpose. Accordingly, we do not agree that the hearing officer's omission as to OP 135.2 constitutes a material error or that it would necessitate a different analysis than the standard set forth in OP 420.1. We read both policies essentially to provide that the grievant was authorized to use physical force against an inmate, but only as a last resort and only to the minimum extent he reasonably perceived necessary to protect people and/or to control the situation.

¹⁷ Agency Exs. at 596.

¹⁸ *Id.*

¹⁹ *Id.* at 599.

²⁰ *Id.*

²¹ *Id.* at 596; *see id.* at 291.

²² *Id.* at 599.

As a matter of agency policy, the record does not necessarily support the hearing officer's finding that the policies do "not prohibit the use of knee strikes by an employee attempting to protect himself or others."²³ As the decision recognized, the grievant was authorized to use "[o]nly the amount of force that is reasonably necessary" to achieve permitted objectives.²⁴ That standard would prohibit knee strikes in circumstances when they exceed the minimum force reasonably necessary, even if delivered for a permissible purpose. Therefore, the fundamental issue presented by the grievance is whether or not the grievant *reasonably* judged the circumstances to require the use of knee strikes as the minimum amount of force necessary for protection from the Inmate. The hearing decision does not squarely address that issue.

The hearing officer essentially found that the grievant used knee strikes for the purpose of protecting officers from the inmate and that agency policy did not prohibit him from doing so. But the analysis as written does not appear to be guided by the "controlling factors" identified in OP 420.1 or the broader reasonableness requirement. The hearing officer's findings do reference the degree of threat or danger posed by the Inmate, in large part because "the Inmate was kicking Officer S."²⁵ We address the hearing officer's factual findings in greater detail below. However, even if the hearing officer's findings accurately described the grievant's subjective belief as to the danger posed by the circumstances, the decision lacks findings that support why these beliefs were *reasonable* based on the record evidence. Further, even if the record supports these factual findings as to the circumstances, the hearing decision lacks application of the record evidence to the pertinent standards on self-defense or defense of others, as described in the agency's appeal.²⁶

Relatedly, the hearing decision does not articulate findings as to whether the grievant could reasonably have perceived offensive knee strikes, *in particular*, as the minimum amount of force required by the situation, in light of potential alternatives. For example, as the agency argues, two of its trainers testified that they teach corrections officers such as the grievant to use hold techniques when physical force is called for, rather than offensive strikes.²⁷ In contrast, the grievant testified that he was not thinking about that training at the time of the incident; he was instead trying to distract the inmate from kicking and trying to roll over.²⁸ Despite this evidence about what was reasonably required by the situation, the hearing decision is silent as to the material issue of whether the grievant should have limited his use of force to the tactics he learned in training, as the agency charged. Even assuming that the agency failed to meet its burden as to that issue, it is not clear from the hearing officer's analysis why knee strikes may have been a reasonable tactic for the purpose of protecting staff in that situation. Although the hearing officer found that the grievant's knee strikes were an "attempt to disrupt the Inmate's behavior,"²⁹ the hearing decision

²³ See Hearing Decision at 7.

²⁴ *Id.* at 5.

²⁵ *Id.* at 6.

²⁶ Request for Administrative Review at 7-11.

²⁷ Hearing Recording at 2:07:55-2:12:12, 2:33:50-2:36:40, 5:13:30-5:17:00.

²⁸ *Id.* at 5:58:40-5:59:55.

²⁹ Hearing Decision at 6.

does not explain why that tactic might have represented a *reasonable* attempt, per agency policy and/or practice.³⁰

Finally, the hearing officer's fifth and sixth reasons for the outcome do not appear to inform the reasonableness analysis required in this case. Although we perceive no error in the hearing officer's finding about the grievant's purpose, the fact that the grievant did not intend to harm or punish the grievant or that the Inmate was not injured is not material to the question under policy of whether the force used was excessive for the circumstances. If an employee sought to use a technique that was not authorized in the given situation, that the employee did not intend to harm an Inmate and was not successful in harming the inmate does not change the fact that the employee took an action that was against policy.

Accordingly, EDR remands the decision to the hearing officer for reconsideration and clarification as to the reasonableness of the specific use of force that the agency identified as misconduct. Upon reconsideration, the hearing officer must make findings as to the performance standards set forth in the agency policies cited in the Written Notice: *i.e.* whether the grievant reasonably judged knee strikes (as opposed to other tactics) to be the minimum force required under the circumstances, as agency policy required.

Facts Supporting the Use of Knee Strikes

In addition to arguing that the hearing officer failed to apply its performance standards, the agency essentially contends that the level of potential danger described in the hearing decision is not supported by the record. Specifically, the agency questions evidence suggesting that the Inmate was kicking Officer S before the grievant delivered knee strikes. The agency also claims it was not reasonable for the grievant to believe the Inmate was not hand-cuffed at the time. Moreover, the agency disputes whether the grievant's decision to use knee strikes was motivated by the possibility that the Inmate might have a weapon.

In reviewing whether the record contains evidence to support the hearing officer's findings, we observe that the security footage of the incident does not support the potential dangers identified in the hearing decision.³¹ As the grievant approached the Inmate, the footage shows four or five agency employees holding him down on the ground. We cannot say that any part of the video evidence supports the hearing officer's findings that the Inmate's "movement was consistent with someone who was not handcuffed"; that the Inmate was attempting to roll and/or reach into his pants; or that the Inmate was violently kicking another officer before the grievant delivered knee strikes.

³⁰ The agency's training materials define a disruption as "a purposeful interruption to an opponent's attack in a way that allows the officer to transition to other control/arrest options," also known as a "strike[]" with a purpose." Agency Exs. at 315. Although the hearing officer found that agency policies "authorized Grievant to protect himself and others," the decision does not articulate how knee strikes might have achieved that purpose. *See* Hearing Decision at 7.

³¹ *See* Agency Exs. at 12.

Based on a review of the record, the only evidence that might support the hearing officer's findings regarding the danger perceived by the grievant is the grievant's testimony. At the hearing, the grievant testified that his main concern upon engaging with the Inmate was that the Inmate was continuously attempting to push himself up off the ground, despite the grievant and other officers applying force to hold him down, and "may be able to hurt somebody" if he succeeded.³² The grievant also testified that he heard another officer say the Inmate was kicking, and that his goal was to "get [the Inmate] back down into a position where he could be put back into compliance" because current tactics were not achieving that result.³³ Conclusions as to the credibility of witnesses and the weight of their respective testimony on issues of disputed facts 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.³⁴

However, because the grievant's testimony conflicts with video of the incident as to the issue of danger, the weight apparently accorded to that testimony requires explanation. For example, at the time the grievant approached the scene, the hearing officer's finding that the Inmate was "clearly" not under control is not supported by the video evidence. The hearing decision is also silent as to the timing of when the Inmate's alleged kicks caused injury to Officer S or when the grievant allegedly heard someone say that the Inmate was kicking. The video evidence does not support a determination that the Inmate was kicking anyone when the grievant reached the Inmate.

Additionally, it is not clear that the evidence supports the hearing officer's finding that the Inmate's "movements were consistent with someone who was not handcuffed," as we are uncertain what that statement refers to. Indeed, as the video of the incident shows, the grievant's position was directly at the level of the Inmate's arms, and we find nothing in the record to suggest why the grievant could not see the handcuffs, given his position. As a result, we are unable to identify evidence that would support a finding that it was reasonable for the grievant to believe the Inmate was not handcuffed when he delivered the knee strikes.

Similarly, we are unable to determine what evidence might support a reasonable perception that the Inmate could have a weapon. The hearing officer found that the "Inmate tried to reach into his pants," and the grievant's "biggest concern was he did not know if the Inmate had a weapon."³⁵ The grievant made these statements in his recorded interview with the agency's investigator, not during his testimony at the hearing.³⁶ Our review of that interview suggests that the grievant saw the Inmate trying to reach into his pants after the grievant delivered the knee strikes, not before. Moreover, given our analysis in the preceding section, we are unable to evaluate the significance

³² Hearing Recording at 5:39:50-5:42:40.

³³ *Id.* at 5:39:50-5:47:40, 5:56:50-5:57:40.

³⁴ *See, e.g.*, EDR Ruling No. 2020-4976.

³⁵ Hearing Decision at 3-4.

³⁶ *See* Agency Exs. at 78.

of the grievant's bare statement during the interview – not subject to cross-examination – that he “did not know if the Inmate had a weapon.” To the extent that the hearing officer's reconsideration confirms any of these findings, the reconsideration decision must identify the grounds in the record to support such findings.

As additional guidance upon remand, in assessing whether the grievant reasonably perceived knee strikes to be an appropriate amount of force under the circumstances, EDR recognizes that relevant factors would include the inmate's behavior prior to the knee strikes, any other situational circumstances suggesting the grievant may pose a threat of physical harm, the feasibility of less forceful tactics that could be just as effective to control the situation, and the plausibility of any rationale behind knee strikes as a tactic. On remand, the hearing officer is authorized to consider or reconsider each of these factors, as well as any other factors he deems relevant to the material issue of whether the grievant reasonably perceived knee strikes to represent the minimum amount of force necessary under the circumstances. To the extent the hearing officer determines that his reconsideration would benefit from additional evidence, he is authorized to reopen the record to accept such evidence at his discretion. Should the hearing officer ultimately determine that the agency proved misconduct, the hearing officer is also authorized to reconsider mitigating and aggravating factors.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR concludes that the hearing decision is not consistent with state and agency policy. EDR remands this case to the hearing officer for further consideration of the evidence in the record, and/or additional evidence as he may accept into the record, under the agency policies applicable to the grievant's conduct in this case. 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.³⁷

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.³⁸ 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.³⁹ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.⁴⁰

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³⁷ See *Grievance Procedure Manual* § 7.2.

³⁸ *Id.* § 7.2(d).

³⁹ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

⁴⁰ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).