

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 11801

Hearing Date: April 13, 2022  
Decision Issued: April 19, 2022

**PROCEDURAL HISTORY**

On October 22, 2021, the Grievant was issued a Group II Written Notice.<sup>1</sup> On November 8, 2021, the Grievant timely filed a grievance challenging the Agency's actions.<sup>2</sup> On January 27, 2022, the Director of the Office of Employment Dispute Resolution issued Qualification Ruling #2022-5348 regarding this matter. On February 7, 2022, the grievance was assigned to a Hearing Officer. A hearing was held on April 13, 2022.

**APPEARANCES**

Grievant Counsel  
Agency Representative  
Grievant  
Witnesses

**ISSUES**

Did the Grievant, in the early morning of April 13, 2021, fall asleep at Mansion Gate Post (MGP) and similarly fall asleep while on duty on April 21, 2021. If so, were either or both of these incidences violations of General Order 104 (III)(D)(1)(d) and General Order 118 (III)(K)(3)(b)(11)?

**AUTHORITY OF HEARING OFFICER**

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> 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 termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

<sup>1</sup> Agency Exhibit 1, Tab E, Page 1

<sup>2</sup> Grievant Exhibit 1, Tab 9, Page 3

<sup>3</sup> See Va. Code § 2.2-3004(B)

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. Thus, the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency’s decision.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented, I make the following findings of fact:

The Agency provided me with a notebook containing tabs A through I. The Grievant had no objections to the contents of Agency’s notebook and it was accepted as Agency Exhibit 1.

The Grievant provided me with a notebook containing tabs 1 through 9. The Agency had no objections to the contents of the Grievant’s notebook and it was accepted as Grievant’s Exhibit 1.

This matter commenced on May 18, 2021, when Complaint Form, #2021-0006, was issued by Officer A.<sup>7</sup> This form alleged that Grievant had fallen asleep in the MGP on the morning of April 13, 2021. On May 19, 2021, this matter was assigned to Officer B for investigation. On June 8, 2021, B informed Grievant that he had been assigned to investigate the allegation of Grievant falling asleep while on duty.<sup>8</sup>

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<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> Agency Exhibit 1, Tab A, Page 1

<sup>8</sup> Agency Exhibit 1, Tab A, Page 2

On May 30, 2021, and June 9, 2021, B interviewed Officer M regarding this matter. M's duty station on the times in question was the MGP. Grievant's duty station was what was referred to as a roving patrol with no fixed point of assignment. All witnesses, including A, B, M, and T confirmed these duty stations in their testimony before me. In his interview regarding the April 13, 2021, incident, M stated in part "Grievant was in the MGP... Officer T came by and asked Grievant to come by his office... T left... Grievant fell asleep... I texted T and said call him and get him out of here... I woke Grievant and said T is calling... Grievant fell back asleep... few minutes later Grievant got up and left..."<sup>9</sup> M estimated that Grievant was asleep for 20 minutes.<sup>10</sup>

During the investigation of the sleeping incident of April 13, 2021, a similar concern with sleeping while on duty was discovered for April 21, 2021. Regarding the incident of April 21, 2021, in his interview, M stated in part "Grievant came to the MGP... sat down on the chair behind me... said he was tired... I heard him snoring... and he is asleep"<sup>11</sup>

In his testimony before me, M stated that he attempted to awaken Grievant by calling his name and by touching his leg. On both dates, Grievant testified that he sought the help of ranking officers as he did not feel it was his duty to keep Grievant awake and he did not want to be caught up in whatever repercussions resulted from this issue with Grievant.

On May 29, 2021, B interviewed T regarding the incident of April 13, 2021. In his interview, T stated in part "I asked Grievant to come to my office... M texted me that Grievant was out and snoring... I called Grievant on radio... he responded... M texted me and said Grievant was still there... Grievant came back to the office..."<sup>12</sup> In his testimony before me, T said he made 2 radio calls to Grievant and he felt Grievant was slow to respond. He also testified that Grievant told him he did not hear the calls.

On June 9, 2021, B interviewed the Grievant. He stated that "... I find all the allegations to be false..."<sup>13</sup> He also stated that "... Sleeping is irresponsible, it shows that you do not have any respect for your job and those around you..."<sup>14</sup> "... The only thing that would bring me to the MGP would be the relief unit if we were short staffed... that would be the only reason..."<sup>15</sup> "... I admit to the nod, and we might nod. It's like a five-minute nod, but it's not no, never me sleeping. Ever. Never. Not to the point where I'm jeopardizing my job..."<sup>16</sup> "... So when I go by the MGP, it's usually, if I am tired, if I am sleepy, I go by the MGP so we can keep each other up..."<sup>17</sup>

The Grievant, in a memorandum dated October 19, 2021, stated that "I also practice silent wakefulness."<sup>18</sup> On June 14, 2021, in a memorandum to B, he said in part... "I admit to being exhausted some nights... but I have never blatantly gone to sleep... very seldomly, I do tend to close

<sup>9</sup> Agency Exhibit 1, Tab A, Page 8, Lines 12-22

<sup>10</sup> Agency Exhibit 1, Tab A, Page 8, Line 33

<sup>11</sup> Agency Exhibit 1, Tab A, Page 5, Lines 14-22

<sup>12</sup> Agency Exhibit 1, Tab A, Page 13, Lines 6-20

<sup>13</sup> Agency Exhibit 1, Tab A, Page 27, Line 32

<sup>14</sup> Agency Exhibit 1, Tab A, Page 23, Lines 36-37

<sup>15</sup> Agency Exhibit 1, Tab A, Page 28, Lines 50-52

<sup>16</sup> Agency Exhibit 1, Tab A, Page 30, Lines 123-125

<sup>17</sup> Agency Exhibit 1, Tab A, Page 31, Lines 158-159

<sup>18</sup> Grievant Exhibit 1, Tab 6, Page 21

my eyes... in a practice called quiet wakefulness...”<sup>19</sup> No evidence was offered as to the veracity of either quiet or silent wakefulness, other than the Grievant testifying that he used it in the military. The Grievant testified that he used a charger at the MGP for his personal cell phone. He offered no evidence that this phone was anything other than for personal use and several other witnesses testified that it was not an official piece of equipment. The Grievant also testified that his official radio needed to be charged and he had placed it in a charger at the MGP. This of course is during his shift. I heard testimony that each officer was to have this piece of equipment fully charged at the beginning of their shift. The Grievant further testified that he had turned down the volume on his official radio to not interfere with calls that may be coming to M, while M was in his required duty station at the MGP. By so doing, Grievant effectively removed himself from the vital communication loop of this Agency.

During his testimony, Grievant stated that M was often asleep at his post. Grievant also acknowledged that, on April 12, 2018, he signed the LAW ENFORCEMENT OATH OF HONOR. This oath states in part “I will always have the courage to hold myself and others accountable for our actions.”<sup>20</sup> Grievant never reported to anyone that M was sleeping at his post, thereby violating his oath and jeopardizing those he was to protect. Assuming this allegation were true, by failing to honor his oath, Grievant seriously damages his credibility. Grievant testified that he felt targeted when a new cohort of ranking officers joined the Agency. Other than the bald statement that he felt targeted, he offered no evidence to substantiate this assertion.

Grievant further testified that he and M disagree all the time and that M does not like me. The MGP is a small enclosure, perhaps 8x10 feet, with 2 chairs. Yet it was here, with a person he disagrees with and who does not like him, that Grievant seems to have often frequented. The Grievant offered no testimony as to why M would perjure himself or what M had to gain from his testimony. Likewise, he offered no testimony as to why the evidence presented by any of the other witnesses was not truthful.

General Order 104 (III)(D)(1)(d) states “While on duty, employees shall remain awake, alert, aware of their surroundings, and attentive to their duties at all times.”<sup>21</sup>

General Order 118 (III)(K)(3)(11) states Third Group Offenses include “sleeping during work hours.”<sup>22</sup>

Standards of Conduct Policy 1.60, Attachment A gives as an example of a Group III offense “sleeping during work hours.”<sup>23</sup>

Standards of Conduct Policy 1.60 defines a Group III offense as one that includes misconduct of such a severe nature that a first occurrence normally should warrant termination.<sup>24</sup>

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<sup>19</sup> Grievant Exhibit 1, Tab 9, Page 9

<sup>20</sup> Agency Exhibit 1, Tab I, Page 2

<sup>21</sup> Agency Exhibit 1, Tab D, Page 29

<sup>22</sup> Agency Exhibit 1, Tab D, Page 56

<sup>23</sup> Agency Exhibit 1, Tab D, Page 23

<sup>24</sup> Agency Exhibit 1, Tab D, Page 9

Grievant acknowledged that he would nod for 5 minutes. He never defined nod. A general definition would be to have an involuntary downward motion of the head from drowsiness. He admitted that he closed his eyes. He admitted that he was exhausted. He admitted that when he went to the MGP that he was tired or sleepy. He admitted he had no recall of many of the allegations made. He had no recall of M calling his name or touching his leg. He admitted he did not hear the radio calls. Based on the credibility of the Agency's witnesses and the lack of such credibility of the Grievant, the documentary evidence presented by the Agency and the documentary evidence presented by the Grievant, I find that the Agency has borne its burden of proof in this matter.

After the qualification of this matter for a hearing and my appointment as Hearing Officer, the Grievant resigned from the Agency.<sup>25</sup> Accordingly, the Grievant was not an employee of the Agency at the time of the hearing.

### **MITIGATION**

*Va. Code § 2.2-3005(C)(6)*, authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute 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. 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.

If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

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<sup>25</sup> Grievant Exhibit 1, Tab 2, Page 1

As the offenses in this matter justified Group III notices and termination and as the Agency mitigated them to a single Group II offence with a 3 day suspension, I find no reason to further mitigate this matter.

### **DECISION**

For the reason stated herein, I find the Agency has borne its burden of proof in this matter and that the issuance of the Group II Written Notice with a 3-day suspension was proper.

### **APPEAL RIGHTS**

You may request an administrative review by EDR within **15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EDR within 15 calendar days of the date the decision was issued.**

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

  
William S. Davidson, Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.