

**COMMONWEALTH OF VIRGINIA
Department of Human Resource Management**

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

**In re:
Case Number: 11969**

Hearing Date: June 6, 2023
Decision Issued: June 9, 2023

PROCEDURAL HISTORY

The Hearing Officer was appointed effective May 8, 2023. Upon being appointed, a pre-hearing telephone conference was conducted on May 8, 2023 and the Grievance Hearing was scheduled for June 6, 2023, with a copy of all exhibits and list of witnesses to be provided no later than May 30, 2023.

The Grievance Hearing was conducted on June 6, 2023 as scheduled.

The grievance hearing addressed the two Group III Written Notices issued on March 20, 2023 with termination of employment. The offenses for which the Written Notice was issued were that on March 22, 2022 the Grievant was sleeping on duty in a marked patrol vehicle on interstate 64, exit 211 on-ramp and that the Grievant was sleeping on March 24, 2022 inside a marked patrol vehicle on interstate 64, authorized vehicles only crossover at the 224.5 mile marker.

Prior to the hearing, the Grievant sent an email to the Hearing Officer and to the Agency Representative stating that the Grievant did not dispute the allegations but contest the Grievant's termination from employment, alleging that the termination is a violation of the Americans With Disabilities Act of 1990 or ADA (42U.S.C. Section 12101). After being placed under oath, the Grievant confirmed the statement made in the email.

The hearing then proceeded, by agreement between the Agency and the Grievant, that the parties would stipulate the testimony of the witnesses listed by the Agency unless the Agency chose to call a witness to testify at hearing.

APPEARANCES

Grievant

Agency Representative

ISSUES

1. Did the Agency's evidence prove by a preponderance of the evidence that the Grievant's conduct was in violation of the alleged policy, procedure or directive?
2. Whether any such violation was a Group III violation under the standards of conduct?
3. Whether the Agency considered mitigating and aggravating factors?
4. Whether the Written Notice was consistent with law and policy, specifically including the Americans With Disabilities Act of 1990?

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 Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual (GPM) section 5.8. a preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM section 9.

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook (although titled on the cover as Agency Exhibits) with tabs 1-10.

The Grievant did not submit any exhibits.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness called to testify, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant with the job title of Trooper II. Such employment was governed by the following:

- Virginia Department of State Police Standards of Conduct General Order ADM

11.0, which includes as a violation of the Standards “sleeping during working hours.” (Agency Exhibit 8)

- Under the Standards of Conduct, a Group III Offense is stated to be appropriate for offenses that endangers others in the workplace and that such discipline shall take the form of the notice and termination.

The stipulated evidence of the Agency’s first witness, Trooper S., indicated that the Grievant had on numerous occasions slept while on duty and that the Grievant shift partners had lost confidence in working with Grievant.

The Agency’s second witness, Sergeant F. testified that prior to termination, the Grievant had been a marginal employee with multiple verbal and written warnings and a “needs improvement plan.” Further the witness testified that the Grievant had had one written counseling for sleeping while on duty. The witness quoted the Grievant as having told the witness on May 5, 2021 that the Grievant “said “I don’t know why I fell asleep.” Further, the witness testified that the Grievant as late as March 21, 2022 had still not consulted a doctor regarding the Grievant’s sleep problem and had only talked “to my mother.” The witness testified that the Grievant had purchased a c-pap machine but only used the c-pap machine for three days because it was “uncomfortable.” Finally, the witness testified that the Grievant had fallen asleep eight times while on duty in the Grievant’s control cruiser and had never asked for an accommodation under the ADA.

The Agency’s next witness, First Sergeant B., was the Area 3 Commander when on April 5, 2022 the Grievant sleeping issues were addressed. The First Sergeant testified that the Grievant’s sleeping issues began in 2018 but that the Grievant did not address the sleeping issues with a medical doctor, stating “I think I have overcome [the sleeping problems] by taking vitamins and losing weight”. The witness stated that the Grievant admitted falling asleep while operating a vehicle during the last six months fourteen times, with eight of those times being while operating the patrol cruiser. The witness testified that the Grievant never came to the witness seeking an accommodation regarding the sleep problem.

First Sergeant B. further testified that the Grievant had been on a Performance Plan unrelated to the sleeping issues but related to the Grievant being late, sloppy and missing deadlines. The witness testified that the Grievant consistently operated on a substandard level.

The testimony of the Agency’s next witness, Trooper P., was stipulated to the effect that Trooper P. found the Grievant sleeping while on duty and the Grievant stated that the Grievant had stayed up late playing video games.

The Agency’s next witness was Major H. who was the reviewing officer in the investigation regarding the Grievant’s conduct. Major H. testified that before reaching the decision to terminate the employment of the Grievant, the mitigating circumstances that the

Grievant had twelve years of service and that each year the Grievant was deemed a “contributor.” However, Major H. testified that there were more aggravating circumstances than mitigating circumstances including between 2015 and 2020 the Grievant had five allegations which were sustained and that in 2020 the Grievant had been transferred to Area 3 as part of the discipline for active Group III Written Notice in lieu of termination. Major H. further testified that before the decision to terminate was reached, Human Resources was consulted and it was confirmed that under the EEOC the Agency had the right to terminate the Grievant’s employment.

Major H. testified that the Grievant never sought treatment for the Grievant’s sleeping disorder until after the Grievant’s employment was terminated. Major H. was particularly concerned with the danger of the Grievant missing a call for assistance from another trooper and the threat of harm the Grievant posed to the public while operating a cruiser.

As a result of the Grievant implying during cross-examination of Major H. that the Grievant had never missed a call for assistance. Trooper S. was called to testify that a trainee had reported to Trooper S. that the trainee was working midnight shift with the Grievant, had a pursuit and that Grievant never responded despite being in the pursuit area.

The Agency’s final witness was Doctor V. who testified regarding the Grievant’s “fitness for duty” examination and interview. Doctor V. testified that Doctor V. met with the Grievant on May 3, 2022 regarding the Grievant’s problem with sleep deprivation. The doctor testified that after a PCP study determined “sleep apnea”. The Grievant was placed on light duty. However, Doctor V. testified that it was reported to Doctor V. that the Grievant was not compliant with the “bi-pap” regimen to address the Grievant’s sleep disorder.

Upon the Agency concluding its case, the Grievant testified that while the Grievant does not dispute the allegations, the Grievant believes that due to the provisions of the ADA, the Agency should not have terminated the Grievant’s employment. Upon cross-examination, the Grievant admitted that although the Grievant first knew about the sleeping issue in 2018, the Grievant never sought medical attention. The Grievant also admitted that when asked by Sergeant B. regarding concerns that the Grievant would have about operating a cruiser with his sleep disorder, the Grievant responded that the Grievant’s main concern was the safety of the Grievant’s girlfriend, rather than the safety of the general public and the safety of the other troopers. The Grievant further admitted that the Grievant never asked for an accommodation prior to being terminated from employment.

In addition to the testimony of the Agency witnesses, in person and as stipulated, and the testimony of the Grievant, the Hearing Officer took into consideration the following:

- Administrative Investigation report (Agency Tab 2)
- Correspondence regarding the administrative investigation (Agency Tab

3)

- Previous counseling and administrative investigations (Agency Tab 5)
- Grievant concise employment history (Agency Tab 6)
- Photographic and video evidence (Agency Tab 9 and DVD)

Finally, the Hearing Officer considered the U.S. Equal Employment Opportunity Commission standards, the Virginia Code of Virginia Human Rights Act, and the ADA.

CONCLUSIONS

Unacceptable behaviors are divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” (Standard of Conduct)

Virginia Code Section 2.2-3005.1 authorizes Hearing Officer’s to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “accordance with rules established by the Department of Human Resource Management...”. Under the rules for Conducting Grievance Hearings “[a] hearing officer must give deference to the agency’s consideration in the assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. 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 and (3) the disciplinary action was free of improper motive.

The Commonwealth of Virginia provides certain protections to employees Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary action. The Department of Equal Employment and Dispute Resolution has developed Grievance Procedure Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the Agency has the burden of going forth with the evidence. It also has the burden of proving, by preponderance of evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules For Conducting Grievance Hearings*. These Rules state that on a disciplinary grievance a Hearing Officer shall review the facts *de novo* and determine:

- A. Whether the employee engaged in the behavior described in the written notice;

- B. Whether the behavior constituted misconduct;
- C. Whether the discipline was consistent with law and policy; and
- D. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The Grievant's behavior is not disputed. The only issue is whether the Agency is not allowed to terminate the Grievant's employment as a Virginia State Trooper due to the provisions of the ADA. The Hearing Officer concludes that the Agency proved by a preponderance of the evidence that the Grievant sleeping on duty was a violation of the Standards of Conduct; that the violation was a violation of the most serious nature and was a Group III violation on each of the two occasions; that the Agency did consider the mitigating factor of the Grievant being a contributor during the Grievant's twelve years of employment but also considered the aggravating factors of the Grievant having an active Group III Written Notice; and finally that the Written Notice issued as a Group III with termination of employment was consistent with law and policy.

Further, the Hearing Officer concludes that the Grievant did not seek accommodation related to the Grievant's sleeping disorder prior to the Grievant's termination from employment and that termination of employment is not contrary to the provisions of the ADA.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice with termination is upheld.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resources Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.[1]

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

ENTERED: _____
Date

John R. Hooe, III
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.