

Issue: Group III Written Notice (sleeping during work hours); Hearing Date: 10/17/18;  
Decision Issued: 11/07/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11253; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11253**

Hearing Date: October 17, 2018  
Decision Issued: November 7, 2018

#### **PROCEDURAL HISTORY**

On May 31, 2018, Grievant was issued a Group III Written Notice of disciplinary action for falling asleep while sitting with an offender.

On June 10, 2018, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 20, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **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 raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

The Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and Officer M were at a Hospital providing security for an Offender who was a Hospital patient. The Offender was recovering from surgery. The Offender was restrained with flex cuffs, leg irons, and handcuffs. A nurse said it was necessary to remove the Offender's handcuffs because of his surgery. The Offender's handcuffs were then removed.

The nursing staff periodically entered the Offender's room to check on him. Officer M noticed Grievant "nodding off but he would get up and step outside the room to try to wake up." Grievant asked a nurse to bring him ice and water. Several times during his shift, Grievant would get up and step outside of the room.

Later in the shift, a security guard came into the room and said a nurse told him the Offender's leg cuffs were not on. Grievant and Officer M told the security guard the Offender's leg cuffs were on. The security guard checked for himself and observed the Offender secured by leg cuffs.

A nurse took a picture of Grievant. The picture appears to have been taken by someone standing or kneeling within a few feet of Grievant. The picture showed Grievant seated in a chair with his head slightly back. The picture showed the left side of Grievant's body from his waist to the top of his hat. Only his left eye was visible and that eye was closed. Grievant appeared asleep. The nurse was concerned that Grievant was asleep so she informed her supervisors who informed Agency managers.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>1</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

"Sleeping during working hours" is a Group III offense.<sup>4</sup> The Agency has presented sufficient evidence to show Grievant as asleep during working hours for several reasons. First, the nurse observed Grievant and believed he was sleeping. Second, the nurse was able to get close enough to Grievant to take a picture without him observing her action. If Grievant had been alert he likely would have observed the nurse take his picture. Third, the picture shows Grievant with his left eye closed and head back slightly. The picture is consistent with someone who was asleep. Fourth, Officer M wrote that Grievant was "nodding off but he would get up and step outside the room to try to wake up." "Nodding off" is consistent with someone who was sleepy or sleeping. "Try to wake up" is consistent with someone who was sleepy. When all of these factors are considered, it is more likely than not that Grievant was asleep briefly on May 3, 2018.

Grievant argued that the picture of him did not show he was asleep because the picture was only of the left side of his face and he has a left "lazy eye". Grievant did not testify regarding how having a "lazy eye" would affect his appearance in the picture. The picture was not the only fact supporting the Agency's evidence. When the evidence is considered as a whole, the Agency has presented sufficient evidence to show that Grievant was sleeping during work hours. This forms a basis for discipline even if Grievant was asleep only briefly.

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

<sup>4</sup> DOC Operating Procedure 135.1(V)(D)(2)(h).

Grievant asserted that the picture of him taken by the nurse should not be admitted into evidence because the nurse did not appear at the hearing. The rules of evidence that might apply in a Circuit Court do not apply in grievance hearings. The standard of proof is relevancy. The picture of Grievant relates to the Agency's allegations against him and is admissible.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action 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 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.

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<sup>5</sup> *Va. Code § 2.2-3005.*

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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