

Issue: Group II Written Notice with five days suspension (Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy); Hearing Date: August 28, 2001; Decision Date: August 28, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5259

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Department of Corrections Case Number 5259

Hearing Date: August 28, 2001

Decision Issued: August 28, 2001

PROCEDURAL HISTORY

On May 22, 2001, Grievant was issued a Group II Written Notice of disciplinary action with five day suspension for:

Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established written policy. On May 8, 2001, [Captain] observed you on camera asleep in the lower control booth of HU-5. [Major] also witnesses this incident.

On May 25, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 6, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Captain

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with five day suspension.

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. 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. He is a good employee with no prior disciplinary action.

The Agency has approximately 48 cameras located throughout the Facility. Each camera can be rotated within a specific range to view areas from different angles. A zoom lens feature allows for close-up pictures. Monitors are located in the master control in the Facility's housing unit. While standing in the master control, one can scan through each of the different cameras and observe most areas of the housing unit.

On May 8, 2001, Grievant was working the midnight shift (10 p.m. to 6 a.m.) in the control booth of an inmate housing unit. The Major and Captain began a security check of the Facility. They entered the master control area. As the Major and Captain scanned through the numerous cameras, they observed Grievant sitting in the control room near the window at approximately 4:07 a.m. Using the zoom feature of the camera, the Major and Captain observed Grievant sitting at a chair with his eyes closed and hands below the table in front of him. They observed him for several minutes. The Captain exclaimed words to the effect that "I can't believe this, [Grievant] is a good employee". Also in the master control was another officer. She described what she saw, "I observed [Grievant] on the TV Monitor, laid back in the chair with his hands folded on top of his head with his eyes closed."

Grievant's post order makes him, "Responsible for observing all floor activity and reporting any unusual activity to the floor supervisor." He reviewed the order on at least a quarterly basis.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

There is a distinction between being asleep and not being alert. One can be awake but not alert. There are sufficient inconsistencies in the Agency’s evidence for the Hearing Officer to conclude that Grievant was not asleep. For example, the Captain testified that Grievant’s arms were down by his side whereas the Officer’s statement showed Grievant had his arms above his head. It is unlikely that an individual can sleep while holding his arms above his head for several minutes. Although Grievant may not have been asleep, he clearly was not alert. He was seated and stationary with his eyes closed for several minutes.

Failure to comply with applicable established written policy is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant’s post order requires him to, “Be alert, attentive and observant at all times.” Grievant’s failure to be alert was contrary to this post order. Issuance of a Group II Written Notice is appropriate under the circumstances. Given Grievant’s good work performance and the absence of any prior disciplinary action, however, the suspension must be reversed.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary is **upheld**, however, the five day suspension is reversed. The Agency is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3).

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq., Hearing Officer