

Issue: Group III Written Notice with termination (sleeping); Hearing Date: September 18, 2001; Decision Date: October 5, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5294



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5294

Hearing Date: September 18, 2001
Decision Issued: October 5, 2001

PROCEDURAL HISTORY

On June 29, 2001, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Sleeping during working hours. Employee was observed by [Major] and [Captain] to be sleeping while on Post in the lower control booth of Housing Unit #4 on June 2, 2001.

On July 16, 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 September 4, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 18, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Warden Senior
Captain

Three Corrections Officers
Administrative Staff Specialist
Associate Warden
Major

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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 employed Grievant for approximately three years as a Corrections Officer. He often worked the midnight shift. He received a Group II Written Notice issued May 22, 2001 for being asleep. The Group II Written Notice was reduced to a Group I offense as part of a decision of the Hearing Officer.

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.

Inmates live in cells contained in housing units. Within a housing unit is a control room¹. A corrections officer sitting in the control room is responsible for monitoring activity in the two sections (pods) of the housing unit. The room is secured with bars and has glass windows and a control panel directly in front of the windows. The control panel allows a corrections officer to open and close doors within the two pods.

¹ The control room should not be confused with the master control room. These areas are located in different parts of the Facility.

On June 2, 2001 at 3:18 a.m., the Captain entered the master control center in a section of the Facility. He began his usual process of scanning each of the cameras to observe different areas of the Facility. At approximately 3:20 a.m., the Captain observed Grievant with his head back, eyes shut sleeping. The Captain used the zoom lens of the camera to verify that Grievant's eyes were shut. The Captain was surprised to see Grievant sleeping because Grievant had recently been disciplined for sleeping. The Captain called the Control Officer who was working in master control to come and look through the camera. She could clearly see that Grievant's eyes were closed and confirmed that Grievant was sleeping. Grievant then radioed the Major to come to master control. The Major arrived at approximately 3:30 a.m. and observed Grievant sleeping with his head bobbing. The Captain observed Grievant sleeping until approximately 3:40 a.m. or 3:45 a.m.

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.

"Sleeping during working hours" is a Group III offense. DOCPM § 5-10.17(B)(8). When a correctional officer is asleep, the security of the Facility may be affected. The Agency has established by a preponderance of the evidence that Grievant was sleeping. The Group III Written Notice must be upheld.

Grievant denies he was sleeping. Grievant contends that the Captain could not have determined whether Grievant was asleep using the Facility's camera system. After observing the camera system and considering the demeanor of the witnesses, the Hearing Officer concludes that the camera angles used by the Agency under the circumstances presented would permit the Captain to observe Grievant's face and conclude that Grievant was asleep.

Grievant contends the Agency disciplines employees inconsistently. Grievant offered evidence of another employee at the Facility who had been observed sleeping two times and was not terminated. The evidence showed, however, that after the first incident of sleeping, the employee asked to be moved to a different shift and the Agency agreed. The Agency was slow to move the employee and she received a second group notice for sleeping. After considering its own delay in moving the employee, the Agency believed mitigating circumstances existed to avoid terminating the employee. The Hearing Officer believes this mitigation was appropriate and does not represent inconsistent discipline of employees. Grievant also offered evidence of an

employee who received a Group III Written Notice with 30 day suspension rather than termination. The Agency defends this action because the 30 day suspension was for the first offense of sleeping. The Hearing Officer concludes that the Agency disciplined this other employee more severely than it punished Grievant because Grievant did not receive a suspension for his first offense of sleeping.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee's long service with a history of otherwise satisfactory work performance. DOCPM § 5-10.13(B). In light of Grievant having been disciplined for sleeping a month earlier, the Hearing Officer does not find a basis to mitigate the discipline.

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

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.

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