

Issue: Group II Written Notice with 5-day suspension (sleeping); Hearing Date: November 9, 2001; Decision Date: November 13, 2001; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5325



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5325

Hearing Date: November 9, 2001
Decision Issued: November 13, 2001

APPEARANCES

Grievant
Associate Warden
Four witnesses for Agency

ISSUES

Was the grievant's behavior on June 21, 2001 such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of corrective or disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice and five-day suspension issued on July 6, 2001 for sleeping during work hours on June 21, 2001. The parties did not resolve the grievance at the third resolution step and the agency head subsequently qualified the grievance for a hearing.

The Department of Corrections (hereinafter referred to as agency) has employed the grievant as a correctional officer for three years. Grievant had previously received a Group II Written Notice and five-day suspension on June 19, 2001 for sleeping while in the control room on June 6, 2001.¹ She admitted to falling asleep on that occasion. That Written Notice was still active on June 21, 2001. Other than the two Written Notices, grievant's shift commander considered her an outstanding employee.

The agency has a policy, of which the grievant was aware,² that addresses the professional conduct of employees. Section 5-22.6.B of the policy defines alertness, stating:

Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of departmental regulations. Observed incidents or suspicions of planned incidents shall be reported to the employee's supervisor or the appropriate officer, in accordance with established procedures.³

The importance of maintaining alertness has been discussed with employees repeatedly during muster meetings. Recognizing that employees on the night shift can become bored, management has encouraged employees to identify a "buddy" in another housing unit with whom they can occasionally converse over the intercom when they begin to feel drowsy. However, such discussions are to be brief and employees are told not to tie up the intercom for long periods of time. The standing Post Order for grievant's post requires that control room officer, "Be alert, attentive and observant at all times."⁴

On June 21, 2001, grievant was working the midnight shift from 9:45 p.m. to 6:15 a.m. At approximately 3:20 a.m., a sergeant and a captain were conducting routine rounds of all housing units. As part of their inspection, they viewed television monitors that show interior views of housing units. From the master control unit, they also had the ability to direct cameras located in the control booth of each housing unit and to zoom in for close views of the correctional officer in the control room. For a period of approximately four to five

¹ Exhibit 7. Written Notice, issued June 19, 2001.

² Exhibit 4. Orientation Checklist, signed by grievant on July 14, 1998.

³ Exhibit 3. Department of Corrections Procedure Number 5-22, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*. June 1, 1999.

⁴ Exhibit 9. General Duty # 21, Post Order for *Floor Control Officer*, revised November 2, 2000.

minutes, the sergeant and captain closely observed grievant sitting in a chair in the control room of the housing unit to which she was assigned. Her head was bobbing back and forth and her eyes were closed.

After observing grievant for four to five minutes, the sergeant called grievant by telephone at about 3:35 a.m., told her that they had observed her sleeping and that she should obtain relief and go out on the floor of the housing unit. Grievant did not dispute the sergeant's statements, obtained relief and went to the housing unit floor at about 3:45 a.m.

Grievant had a "buddy" with whom she frequently conversed over the intercom during night shift hours. On June 21, 2001, grievant and her buddy had been conversing off and on from about 2:15 a.m. until the sergeant told grievant to go out on the floor.

The logbook maintained by grievant reflects that she called in an inmate count to master control at 3:10 a.m. The next entry is at 3:30 a.m. when she noted that the post was clear. Grievant subsequently logged a "late entry," noting that the complex count cleared at 3:16 a.m.

When employees have been found sleeping, the facility's practice has been to give a Group II Written Notice and five-day suspension for a first offense and to discharge from employment for a second offense. In this case, because of grievant's otherwise outstanding performance, she was given another Group II Written Notice and a five-day suspension for her second offense. At her request, grievant was moved to the evening shift.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §§ 2.1-114.5 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training⁶ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses those offenses that include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. One example of a Group III offense is sleeping during work hours.⁷ Section 5-10.16 includes acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal. Failure to follow established written policy and failure to follow a supervisor's instructions are Group II offenses.

The agency's two witnesses (sergeant and captain) both testified credibly, forthrightly and consistently that they had observed grievant bobbing back and forth in her chair with her eyes closed for a period of four to five minutes. The zoom camera allowed them to view the grievant's face closely to assure that her eyes were closed. Grievant denied sleeping. She and her "buddy" both testified that they were talking on the intercom more or less continuously from 2:15 a.m. until 3:30 a.m.

In weighing the evidence, the hearing officer concludes that the testimony of the sergeant and captain is more persuasive for four reasons. First, the

⁵ § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*.

⁶ Now known as the Department of Human Resource Management (DHRM).

⁷ Exhibit 2. Department of Corrections Procedure Number 5-10.17, *Standards of Conduct*, June 1, 1999.

captain was especially complimentary of grievant's overall performance and considers her an outstanding employee. Second, this assessment of grievant's value to the agency is corroborated by the fact that the agency did not discharge grievant for her second sleeping offense. Rather, the agency elected to issue the same discipline as it had issued for the first offense.

Third, grievant initially testified that she was talking on the intercom with her buddy "off and on" during the night. Grievant later changed her statement, contending that she had been talking "continuously." Grievant and her buddy were both questioned about the subject matter of their discussion, which involved vacation plans. Given the very limited responses from both, it is more likely than not that they were only talking "off and on" for 75 minutes rather engaging in a continuous conversation. Thus, it is probable that there were short periods of time during which neither grievant nor her buddy were talking on the intercom.

Fourth, while not conclusive, the fact that grievant made a late entry after 3:30 a.m. for something that occurred at 3:16 a.m. appears to corroborate that she was not fully alert during the period from 3:10 a.m. to 3:30 a.m. Therefore, the agency has borne the burden of proof and demonstrated, by a preponderance of the evidence, that grievant was sleeping during work hours on June 21, 2001.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and five-day suspension issued to the grievant on July 6, 2001 is AFFIRMED. This Written Notice shall be retained in the grievant's personnel file for the period specified in Section 5-10.19.A of the Standards of Conduct.

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 three 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.

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.

David J. Latham, Esq.
Hearing Officer