

Issue: Group III Written Notice with termination (sleeping during work hours);
Hearing Date: January 2, 2002; Decision Date: January 4, 2002; Agency:
Department of Corrections; AHO: David J. Latham, Esquire; Case Number:
5340



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5340

Hearing Date: January 2, 2002
Decision Issued: January 4, 2002

PROCEDURAL ISSUE

The Written Notice lists the dates of offenses as August 23, 2001 and October 9, 2001. The latter date was a typographical error. Both parties agree, and other documentation confirms, that the second offense actually occurred on October 3, 2001.¹

APPEARANCES

Grievant
Three witnesses for Grievant
Assistant Warden
Legal representative for Agency

¹ Exhibit 7. Written Notice issued to grievant on October 9, 2001.

ISSUES

Was the grievant's behavior on August 23, 2001 and October 3, 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 III Written Notice issued on October 9, 2001 for sleeping during work hours on August 23 and October 3, 2001. Following a suspension of four workdays, the grievant was discharged from employment on October 18, 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 corrections officer senior for eight years. The Chief of Security considers grievant to be straightforward and honest but noted that he had a significant absence/tardiness problem. Grievant had previously received a Group II Written Notice for failure to report to work for six consecutive days in February and March 1999.² He had also received a Group I Written Notice for violating the institution's smoking policy in March 2001.³ Both written notices remain active as of this date.

The chief objective of grievant's position description is:

Maintains security, custody and control over inmates at the institution and while in transport, by observing and initiating corrective and/or disciplinary action for inappropriate behavior. Supervises inmates' daily activities and observes and records their behavior and movement to ensure their safe and secure confinement.⁴

On August 23, 2001, grievant was assigned to work in the kitchen area from 6:00 a.m. to 6:00 p.m. While working in the kitchen area, grievant is subject to a post order that requires him to provide security and supervision for the Food Service Department.⁵ At about 12:35 p.m., the kitchen manager found the grievant asleep in a chair in the back of the kitchen. Two inmates were in the area at the time. Grievant acknowledged that he had dozed off but did not

² Exhibit 10. Written Notice, issued June 2, 1999.

³ Exhibit 10. Written Notice, issued June 8, 2001.

⁴ Exhibit 1. Position Description for corrections officer senior.

⁵ Exhibit 3. Security Post Order 37, *Kitchen Officer*, November 30, 2000.

intentionally go to sleep. He stated that he had been up late the previous night and was tired. The incident was promptly reported to grievant's supervisor who advised grievant by memorandum that he was recommending to his superiors that grievant be given a Group III Written Notice.⁶ During the next five weeks, grievant was frequently absent and the assistant warden was unable to coordinate a meeting with grievant before the second incident occurred.

On October 3, 2001, grievant was working a roving patrol. Part of his responsibilities included driving a vehicle around the perimeter road outside the correctional facility. During this patrol, grievant carries a .38 caliber pistol and six rounds of ammunition.⁷ At about 10:40 a.m., a captain drove along the perimeter road and found grievant asleep in his vehicle.⁸ She drove alongside grievant's vehicle and waited for at least a minute or more observing grievant asleep. She then sounded the horn of her vehicle and the grievant awakened. Grievant saw the captain and said, "You got me." Grievant acknowledged being tired and also acknowledged that he was asleep on this occasion but again averred that he did not intentionally go to sleep.

Following the August 23, 2001 incident, grievant visited his primary care physician because he had recently had a diabetic episode. During his visit, grievant mentioned to the physician his falling asleep on the job. She referred him to a sleep specialist for observation but the first available appointment was October 16, 2001.⁹ Subsequently, grievant was able to get an earlier appointment with the sleep specialist on September 19, 2001. That physician suspected that grievant might have sleep apnea and scheduled polysomnography (sleep study) on October 1, 2001. On October 4, 2001, grievant met again with the specialist who diagnosed obstructive sleep apnea (OSA), noting that this condition causes excessive daytime fatigue. The physician prescribed the use of a CPAP (Continuous Positive Airway Pressure) machine while sleeping. Grievant obtained a CPAP machine approximately three weeks later. He has been using the equipment since late October, now feels more rested during the day and does not have a problem falling asleep during waking hours.

Grievant testified that he has never previously fallen asleep at work. While sitting at home during off-duty hours or during sermons at church, he has occasionally dozed off but did not find that unusual. Grievant does not know why the specialist noted that grievant had apnea symptoms for at least 10 years.¹⁰ OSA is the most common form of sleep apnea and occurs when tissues in the

⁶ Exhibit 5. Memorandum from sergeant to grievant, August 23, 2001.

⁷ Exhibit 4. Security Post Order 8, *Roving Patrol*, November 30, 2000.

⁸ Exhibit 6. Memorandum from captain to major. (Undated but written October 3, 2001)

⁹ Exhibit 9. Work Notes from primary care physician, multiple dates.

¹⁰ Exhibit 11. Statement of sleep specialist physician, undated.

upper throat collapse at intervals during sleep, thereby blocking the passage of air. One symptom of OSA is excessive daytime sleepiness.¹¹

Because of the nature of a correctional officer's job responsibilities, staying awake and alert is critical. Employees found asleep are routinely disciplined for a first occurrence and discharged from employment for a second occurrence. Employees are required to advise the watch commander during the muster meeting before the start of a shift, if they have any problems (such as being excessively tired) that might affect their job performance.

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.¹²

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 Training¹³

¹¹ Exhibit 12. Sleep Apnea Report 27, June 2001.

¹² § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*, Effective July 1, 2001.

¹³ Now known as the Department of Human Resource Management (DHRM).

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.¹⁴ This offense is also considered a Group III offense under the Standards of Conduct policy applicable to all state employees.¹⁵

The underlying facts in this case are uncontroverted. Grievant admits that he was sleeping on the two dates cited. Therefore, by a preponderance of the evidence, the agency has demonstrated that the grievant committed a Group III offense by sleeping during work hours on two separate occasions.

Grievant argues that, because he did not intentionally go to sleep, the discipline of discharge is too harsh. He would be willing to accept a suspension but does not feel his employment should be terminated. The Standards of Conduct policy does not differentiate between voluntary and involuntary sleeping. When an individual is asleep, he is unable to perform the responsibilities for which he was employed. It makes no difference whether an employee deliberately decides to sleep or whether he dozes off due to fatigue; the result is the same. In the instant case, grievant was charged with the particularly sensitive responsibility of remaining alert to assure the safety and security of inmates in a correctional facility. When he fell asleep in the kitchen in the presence of inmates, he was unable to fulfill his responsibilities and inmates could have attacked him. Falling asleep in a vehicle with a loaded firearm could potentially have been even more hazardous.

Grievant further contends that he should be considered "an individual with a disability" pursuant to the Americans with Disabilities Act (ADA).¹⁶ The Act defines an individual with a disability, in part, as one who has a physical or mental impairment, and the impairment substantially limits one or more of the individual's major life activities.¹⁷ However, the Supreme Court has held that the

¹⁴ Exhibit 2. Department of Corrections Procedure Number 5-10.17, *Standards of Conduct*, June 1, 1999.

¹⁵ DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁶ 42 USC § 12112(a).

¹⁷ 29 CFR § 1630.2(g).

determination of whether a person has an ADA “disability” must take into consideration whether the person is substantially limited in a major life activity when using a mitigating measure, such as medication, a prosthesis, or a hearing aid. A person who experiences no substantial limitation in any major life activity when using a mitigating measure does not have an “impairment.”¹⁸ In the instant case, grievant testified that when he uses CPAP equipment, he does not experience any limitation in his major life activities. Therefore, it is concluded that grievant does not meet the ADA definition of an individual with a disability.

Even though grievant had not been formally diagnosed with OSA until October 4, 2001, he had an obligation to advise his supervisor prior to the work shift that he had been up late the night before and that he was so fatigued that he might not be able to perform his job responsibilities during that shift. However, the grievant did not advise anyone prior to his August 23rd shift about his fatigued condition. Although grievant may have told his supervisor in September that he was going to be tested for possible sleep apnea, he did not tell anyone on October 3, 2001 that he was also fatigued on that day. On this date, grievant already knew that his supervisor had recommended he be given a Group III Written Notice for the August 23rd incident, and that his job was potentially in jeopardy. Thus, grievant had extra reason to be especially certain that he did not further jeopardize his position by again allowing fatigue to cause him to fall asleep. Grievant could have requested a day off or even a leave of absence until his physician was able to provide a solution to his problem. When grievant failed to pursue these reasonable alternatives, he knowingly contributed to the situation that resulted in a repetition of his sleeping during work hours.

Grievant contends that he had submitted a letter dated October 4, 2001 from the sleep specialist prior to or during his discharge meeting with the warden on October 9, 2001. However, none of grievant’s own witnesses (Chief of Security, Captain and Human Resources Officer) recall seeing that letter prior to or during the meeting.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee’s long service or otherwise satisfactory work

¹⁸ *Sutton v. United Airlines*, 527 U.S. _____, 67 U.S.L.W. 4537 (June 22, 1999) and *Murphy v. United Parcel Service, Inc.*, 527 U.S. _____ (1999).

performance.¹⁹

In this case, grievant was not discharged following his first occurrence of sleeping during work hours. Rather, consistent with agency policy, grievant's employment was terminated only after he was found asleep during working hours a second time. The agency handled this case in the same manner as it has for other employees found asleep during working hours and has thus been fair and objective in meting out discipline. Grievant has a moderate length of service with the agency but his performance has been tainted by a continuing absence and tardiness problem. In addition, grievant has incurred two significant disciplinary actions during the past two years. Weighing all these factors, the agency's decision that there are insufficient mitigating circumstances to warrant a reduction in discipline appears reasonable.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and discharge are 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

¹⁹ Exhibit 2. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

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