

Issue: Group III Written Notice with Termination (sleeping); Hearing Date: April 25, 2002; Decision Date: May 14, 2002; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5419



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5419**

Hearing Date: April 25, 2002  
Decision Issued: May 14, 2002

**PROCEDURAL HISTORY**

On December 21, 2001, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during working hours. On January 14, 2002, 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 March 26, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 25, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Legal Assistant Advocate  
Two Corrections Officers Senior  
Sergeant

**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 as a Corrections Officer Senior until his removal December 21, 2001. He had been employed with the Agency for over seven years. He worked at one of the Agency's maximum-security facilities where extremely dangerous inmates are incarcerated. The Agency had previously disciplined Grievant for sleeping during working hours on November 5, 2001.<sup>1</sup> Grievant appealed that discipline and it was reduced by a Hearing Officer from a Group III Written Notice to a Group II Written Notice.

Inmates reside in cells surrounding a large common area. This living area is referred to as a pod. Within pod C-6 at the Institution is a small office with a desk and a chair on each side of the desk. The office has a door and a large curtainless window. One edge of desk is approximately four to five feet from the window. A chair fits snugly between the desk and window. On the other side of the four-foot wide desk is another chair that also fits snugly between the other edge of the desk and the wall behind the chair.

On December 13, 2001 at approximately 10 a.m., the Institutional Attorney entered C-6 and went inside the C-6 pod office. He sat in the chair behind the desk with his back to the wall. Grievant escorted an inmate into the office. The inmate sat in the chair across from the Institutional Attorney. The inmate had his hands cuffed in the front. Grievant left the office door slightly ajar and waited outside. He grabbed a nearby plastic chair and placed the chair approximately eight feet from the outside of the office

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<sup>1</sup> The Agency contends that Grievant also had been sleeping on an earlier occasion but because another corrections officer gave false statements, Grievant was not disciplined for that incident. The Hearing Officer will disregard the Agency's allegation of sleeping because no disciplinary action or counseling was taken against Grievant.

window. He sat in the chair positioning himself so that he could look inside the office and observe the inmate.<sup>2</sup> Looking towards the office, Grievant would see a vertical bar of approximately two to three inches wide dividing the window; then he would see the back of the inmate's body and if the inmate moved, he would see part of the Institutional Attorney facing towards him.

Grievant stretched his legs out in front him and moved his bottom toward the front of the chair. He slouched in the chair. He folded his hands in front of him and rested them on his stomach. Grievant fell asleep with his chin resting towards his chest. As his position became unbalanced, his head would bob quickly and abruptly and then return to the resting position. Grievant slept for at least ten minutes.

The Institution has a control room overlooking the pod. It is elevated approximately 14 feet above the floor of the pod and is approximately 25 feet from where Grievant had positioned his chair. Inside the control room were two corrections officers, Mr. E and Mr. H. Mr. E was the gunnery officer whose job was to stand in front of the several curtainless windows in the control room and look down into the pod to observe the inmates and corrections officers working. Mr. H was the control booth officer whose job was to sit in a chair in front of the control panel. The panel contains switches enabling Mr. H to open and close various security doors.

Mr. E and Mr. H observed Grievant sitting in the chair facing the C-6 pod office. They could not see Grievant's eyes but could see from Grievant's right cheek around the back of his head.<sup>3</sup> They could see Grievant's arms and legs. They observed Grievant for several minutes and concluded that Grievant was sleeping. Mr. H called the Sergeant and asked him to come to the control booth. When the Sergeant arrived, he asked Mr. H why he had been asked to come to the control booth. Mr. H responded by asking the Sergeant to sit in his chair behind the control panel and see whatever the Sergeant observed. The Sergeant looked around the pod and then focused on Grievant. The Sergeant observed Grievant for approximately ten minutes and concluded that Grievant was asleep. During his testimony, the Sergeant indicated he was certain that Grievant was sleeping.

## **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

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<sup>2</sup> Grievant was responsible for protecting the Institutional Attorney in the event the inmate misbehaved.

<sup>3</sup> Mr. E and Mr. H could see the back of the inmate inside the office but could not see the Institutional Attorney seated on the other side of the desk.

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. Webster’s New Universal Unabridged Dictionary defines sleeping as, “to take the rest afforded by a suspension of voluntary bodily functions and the natural suspension, complete or partial, of consciousness; cease being awake.” Grievant’s relaxed position, with bobbing head, over a ten-minute period shows that he was resting with a suspension of partial consciousness and, thus, was sleeping. The Agency has met its burden of proof that Grievant was sleeping during working hours.

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).

There is no basis to mitigate the disciplinary action taken against Grievant. Approximately one month earlier, Grievant had been disciplined for sleeping during working hours. He must have known that the Agency considered sleeping an extremely serious offense and should have taken actions to avoid sleeping during working hours.<sup>4</sup>

Grievant contends Mr. H had a motive to give false statements against him. If the Hearing Officer disregards the testimony of Mr. E and Mr. H, the Agency has presented sufficient evidence through the Sergeant’s testimony to show Grievant was sleeping. No evidence was presented suggesting the Sergeant had any ill feelings towards Grievant or that he was otherwise compromised in his testimony. Indeed, the Sergeant’s demeanor suggested he was credible and he was certain that Grievant was asleep. His testimony was especially credible because his conclusions were drawn independently of Mr. E and Mr. H. Mr. H asked the Sergeant to observe the pod but was not told for what to look. The Sergeant’s conclusions were not influenced by the conclusions of Mr. E and Mr. H. The Agency met its burden of proof.

Grievant contends the Institutional Attorney had the best view of Grievant and did not observe Grievant sleeping. While this may be true, the Hearing Officer cannot conclude that Grievant was awake. The Institutional Attorney was preoccupied with his discussion with the inmate and he did not have a clear view of Grievant. If the Institutional Attorney tried to observe Grievant, his view would have been blocked by the Inmate<sup>5</sup> and by the two to three inch bar dividing the windows. The Institutional

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<sup>4</sup> Even if the Hearing Officer were to reduce the disciplinary action to a Group II Written Notice, Grievant would have two Group II Written Notices for the same infraction within an approximately month period. The accumulation of two active Group II Written Notices would be sufficient to support the Agency’s removal of Grievant.

<sup>5</sup> The inmate was approximately 5’10” tall and weighted 200 lbs.

Attorney did not testify and the only evidence presented from his was a written statement saying "I never saw [Grievant] sleeping at any time while he was escorting me as the institutional attorney."<sup>6</sup> No statement was presented saying the Institutional Attorney continually observed Grievant remaining awake.

Grievant contends the disciplinary action taken against him is harsher than similar action taken against other correctional officers. This argument is unfounded because Grievant did not offer evidence of other employees who had been observed sleeping for the second time and were treated any differently from how Grievant was treated.

## DECISION

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

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<sup>6</sup> Grievant Exhibit 3.

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 DHRM, 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer