

Issue: Group III Written Notice with 10-day suspension (sleeping); Hearing Date: February 28, 2002; Decision Date: March 7, 2002; Agency: Department of Corrections; AHO: Thomas P. Walk, Esquire; Case No.: 5377

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

**DECISION OF HEARING OFFICER  
Department of Corrections Case No. 5377**

**Hearing Date: February 28, 2002  
Decision Issued: March 7, 2002**

PROCEDURAL BACKGROUND

At the request of the grievant the hearing was scheduled beyond the 30 day decision deadline to accommodate the schedule of the grievant's representative.

APPEARANCES

Grievant  
Counsel for Grievant  
Representative for Agency  
Warden  
Three additional witnesses for Agency

ISSUES

Was the grievant asleep while on duty on November 5, 2001? If so, what was the appropriate level of disciplinary action for his conduct?

FINDING OF FACTS

The grievant has been employed by the Department of Corrections as a correctional officer for approximately seven and one-half years. On November 5, 2001,

he was serving as a gun post officer overseeing the C-6 pod. At approximately 10:30 a.m. an Institutional Hearing Officer (IHO) was summonsed to the pod floor by the building sergeant. The sergeant told the IHO that he had yelled multiple times to the grievant to get his attention as he needed to cross over to another pod. The grievant, according to the sergeant, has failed to respond or acknowledge his presence and appeared to be sleeping or dozing. He contacted the IHO to have a witness to the demeanor of the grievant.

The IHO and sergeant stopped on the pod floor at the red line below the control room where the grievant was seated. The red line marked the point at which one seeking to leave the pod was to stop in order to be seen by the officers in the elevated control room. The IHO saw the grievant sitting still in a chair holding his shotgun by at least one hand. The grievant's head was down and his eyes appeared to be closed. When the sergeant called out again the control room officer rose from his position and the grievant came to the control room window to acknowledge the sergeant. Until this time, the control room officer had been observing the showers in Pods C-4, C-5, and C-6. At all relevant times, inmates were out of their cells and in the pod common area.

Incident reports were filed by the sergeant, IHO, and control room officer and an investigation commenced. On November 6, 2001 the grievant told the Warden that he may have been nodding off. He also stated that he was on certain medications that made him sleepy. He was suspended for ten days pending the investigation. On November 15 he was given a Group III Written Notice and suspended for an additional 20 calendar

days.

The investigation revealed that the control room officer had provided false information to cover for the grievant regarding this incident and a prior complaint about the grievant sleeping on duty. The control room officer was given a Group I Written Notice.

#### APPLICABLE LAW AND OPINION

The grievant argued that the Notice should be stricken as being issued in violation of agency procedure 5-10.14. That policy provides that “prior to any disciplinary demotion, transfer, suspension . . . an employee shall be given . . . an explanation of the agency’s evidence in support of the charge.” I find that the agency’s initial suspension was proper under Procedure 5-10.21 dealing with “investigatory suspensions.” I further find that the Written Notice meets the minimal requirements of 5-10.14.

The agency alleged and sought to prove that the grievant violated Section 5-10.7.8 of the agency’s Standards of Conduct by sleeping during working hours, a Group III offense. Under the Employee Grievance Procedure promulgated by the Virginia Department of Employment Dispute resolution, the agency had the burden of proving this by a preponderance of the evidence.

The evidence regarding the actions and omissions of the grievant was not consistent. The grievant testified that he was not nodding off but merely had his

attention focused on a group of three inmates at the rear of the pod. Based on my observations of the demeanor of the witnesses and the totality of their respective testimony, I have discounted the testimony of the grievant, the building sergeant and the control room officer. The most persuasive evidence was the testimony of the IHO and the post-event admissions by the grievant to the Warden. They establish that the grievant failed to maintain an expected level of alertness. I can not find under these facts, however, that “nodding off” is the same as sleeping. It is significant that the grievant was not observed losing control of his shotgun. If he had actually been sleeping it is likely that he would have dropped the gun.

This does not mean that he should be absolved from any blame in this situation. Post Order No. 78 sets forth the duties of the gun room officer. Among these duties is the requirement to “keep your area of control under observation at all times.” This is impossible to do if one is nodding off, dozing, or sleeping. I find that this breach of security is serious enough to justify the issuance of a Group II Notice for failing to “comply with applicable established written policy.” Under the Grievance Procedure, I have the authority to reduce the Group III Notice and will do so, particularly in light of the light punishment given to the control room officer for his misrepresentations.

#### DECISION

The Group III Written Notice issued on November 15, 2001 shall be amended to a Group II Written Notice. I uphold the disciplinary suspension of the grievant for ten

work days.

## APPEAL RIGHTS

### **Appeal Rights**

As the Grievant Procedure Manual sets 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** 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 of the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision 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.

Thomas P. Walk  
Hearing Officer

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

**SUPPLEMENT TO DECISION OF HEARING OFFICER  
Department of Corrections Case No. 5377**

Upon the motion by the agency dated March 14, 2002 I have reconsidered my opinion in this matter. Despite my original erroneous recall of the evidence as to the punishment imposed upon the control room officer I believe that the evidence, even in the light most favorable to the agency, does not support more than a Group II offense as stated in my original decision. I find that there was no credible evidence presented that the grievant was actually asleep while on duty as alleged in the Written Notice.

To clarify my decision, the ten day suspension which I am upholding refers to the time for which the grievant was suspended after the Notice was issued. I do not believe that I have the power to order any reinstatement of benefits or back pay for the days for which he was suspended pending the investigation of the subject incident.

Submitted this March 21, 2002.

Thomas P. Walk, Hearing Officer



