

Issue: Group III Written Notice with 10-day suspension (sleeping during work hours);
Hearing Date: 11/22/02; Decision Date: 11/26/02; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No.: 5563; **Judicial Review: Appealed to the Circuit
Court in Wise County; Outcome: Case dismissed due to lack of jurisdiction
[Case No. L02-341], ruling dated 05/06/03**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5563

Hearing Date: November 22, 2002
Decision Issued: November 26, 2002

PROCEDURAL HISTORY

On June 19, 2002, Grievant was issued a Group III Written Notice of disciplinary action with 80 hours¹ suspension for:

Violation of Employee Standards of Conduct 5-10.17.B.8. Sleeping during working hours.

On July 17, 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 October 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate

¹ The Agency mitigated the suspension to 40 hours during the grievance step process.

Two Sergeants
Captain
Lieutenant

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with 40 hours suspension.

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 employs Grievant as a Corrections Officer Senior at one of its prisons. He is a dedicated and valuable employee. No evidence of prior disciplinary action against Grievant was presented to the Hearing Officer.

Grievant began receiving treatment for nocturnal sleep apnea in May 8, 2000.² His specialist wrote a letter stating:

I understand that he was recently written up³ for falling asleep on duty. Hypersomnia (falling asleep inappropriately) is a common complaint of nocturnal sleep apnea. However, since we have made this diagnosis, we have started treatment, which has already proven effective in his case. This treatment was not started until after [Grievant]'s problem at work but is clearly effective at this time.

If [Grievant] continues to utilize the prescribed treatment, I think that further hypersomnia would be considered highly unlikely.

² Agency Exhibit 10.

³ Grievant transferred from another facility to his current institution. He was counseled but not formally disciplined for sleeping while working at that former facility.

Grievant's treatment included using a CPAP monitor when he slept at night. He used this equipment for approximately six months until there were some problems with his medical insurance coverage. Grievant did not notify the Agency that he was no longer receiving the prescribed medical treatment.

On April 26, 2002 and May 16, 2002, Grievant became sleepy at work and asked to have his post changed to a more active post.⁴ His requests were granted.

On June 7, 2002, Grievant sought medical treatment from the local medical center. He was excused from work until June 9, 2002 because he needed to rest.⁵ On June 9, 2002, Grievant arrived at work at approximately 5:45 a.m. He assumed his post at 6:00 a.m. Part of his responsibilities included opening and closing gates between interior portions of the prison. By 6:21 a.m., Grievant was sitting in his chair asleep. He slept for over two minutes. When Agency staff asked him what he was doing, he truthfully answered that he was asleep.

CONCLUSIONS OF LAW AND POLICY

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.

Group III offenses include, "sleeping during work hours."⁶ It is not disputed that Grievant fell asleep for at least two minutes while working his post. Thus, the Agency has met its initial burden of proof to show that Grievant engaged in behavior rising to the level of a Group III offense.

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.⁷

⁴ Grievant Exhibit 3.

⁵ Grievant Exhibit 2.

⁶ DOCPM § 5-10.17(B)(8).

⁷ DOCPM § 5-10.13(B).

Grievant works at a supermax prison housing the most dangerous inmates in the Commonwealth. In a matter of seconds, what may seem a peaceful day can become a matter of life or death for corrections officers. Part of Grievant's responsibilities include observing corrections officers interacting with inmates and providing backup if necessary. Given the Agency's needs, its low tolerance for sleeping is understandable. Although Grievant's medical condition is unfortunate, when weighted against the Agency's needs, no mitigating circumstances exist.

Grievant contends that before his shift began he asked the Watch Commander if he could work a different post because he felt bad and was tired. According to Grievant, the Watch Commander did not reply to Grievant's request. Based on the evidence presented, the Hearing Officer cannot conclude that the Watch Commander denied Grievant's request.⁸ Grievant approached the Watch Commander during the briefing prior to his shift. Numerous staff attend briefings and several people were attempting to get the Watch Commander's attention on that day. It may be the case that the Watch Commander did not hear Grievant's request.

Grievant contends the disciplinary action may adversely affect his ability to advance within the Agency. There is little doubt that Grievant possesses great potential for advancement, given his professional demeanor and attention to policy and detail. His concern is genuine. Whether Grievant's ability to advance within the Agency is affected by this disciplinary action is too speculative because it is unknown when a position may become available and what the criteria for advancement will be. Thus, Grievant's potential for advancement cannot be considered a mitigating circumstance.

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

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

⁸ Given that Grievant's request to change posts had been granted on two prior occasions, there is no reason for the Hearing Officer to believe the Agency has a practice of arbitrarily denying reasonable request to change posts when an employee is sleepy.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.