

Issue: Group III Written Notice with termination (sleeping during work hours);
Hearing Date: 10/01/04; Decision Issued: 10/04/04; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 873



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 873

Hearing Date: October 1, 2004
Decision Issued: October 4, 2004

PROCEDURAL ISSUE

The agency requested that the hearing officer view the location where grievant parked his vehicle and was found sleeping. With the concurrence of both parties, the hearing officer viewed the location following the conclusion of the hearing.

APPEARANCES

Grievant
Warden
Advocate for Agency
Two witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for sleeping during work hours.¹ As part of the disciplinary action, grievant was removed from employment on June 23, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for four years. He was a Corrections Officer Senior at the time of his separation from employment.

The institution's written post order for officers assigned as Roving Patrol Officer includes the specific duty of maintaining "CONSTANT roving surveillance of the Security Perimeter."³ The order also provides that roving patrol officers are issued, inter alia, a .38 revolver with ammunition, shotgun with ammunition, portable radio, and a state vehicle. The vehicle is equipped with its own radio which comes on automatically when the engine is started. Behind the institution, there is an alternate access road to the facility which is little used. During each shift, the roving patrol officer is required to check the gate across the access road to assure that it is properly secured.

Grievant was assigned on the night shift (5:45 p.m. – 6:15 a.m.) on the evening of June 7 & 8, 2004. He was on tower duty from 6:00 p.m. to 2:00 a.m. and was then rotated to be the Roving Patrol Officer. At about 3:43 a.m., grievant backed his vehicle from the Perimeter Road about 100 feet down the rear access road to the gate.⁴ He turned the engine off, got out of the pickup truck, checked to assure the gate was secure, and reentered the vehicle. He recorded in the vehicle logbook at 3:44 a.m. that all appeared secure.⁵ He felt slightly nauseous and thought that lying down for a moment might make him feel better. Grievant lay down on the bench seat with his head toward the passenger door and his feet on the driver's side of the seat.

Inside the institution, a correctional officer had become ill and received permission to go home. At about 3:40 a.m., a sergeant called grievant on the radio and directed him to meet the sergeant and sick correctional officer at the front gate. Grievant did not respond and the sergeant called him twice more

¹ Exhibit 6. Written Notice, issued June 23, 2004.

² Exhibit 7. Grievance Form A, filed July 7, 2004.

³ Exhibit 1. Specific Post Duty 6, *Post Order #99*, February 2003.

⁴ Exhibit 8. Diagram showing access road gate and roving patrol vehicle.

⁵ Exhibit 2. Vehicle Log Book entries, June 7 & 8, 2004.

without success. After the sick officer had left the facility, the sergeant went inside the facility and advised the shift commander that grievant was not responding to radio calls. The sergeant called both tower officers but neither knew grievant's whereabouts and could not see his vehicle. Although the entire perimeter of the institution is lighted at night, the rear access road and its gate are not lighted. The access road is sloped down away from the perimeter road and is partially obscured by bushes such that in daylight, the top of the access gate can be viewed from only one tower. At night, it is not possible to see from the tower either the access gate or a vehicle parked in front of the gate.⁶

The shift commander called grievant on the radio but there was no response. The sergeant and shift commander then went outside the institution and walked around the perimeter of the facility until they spotted the roving vehicle parked down the access road just in front of the gate. As they approached the vehicle at about 4:06 a.m., the engine and lights were off and there was no movement inside the vehicle. The lieutenant shone his flashlight inside the vehicle and observed grievant lying asleep on the seat with his legs up on the seat.⁷ The lieutenant then rapped on the window with his flashlight and grievant sat up. Grievant rolled down the driver's side window and asked, "Am I going to be fired for this?" The lieutenant directed grievant to drive to the front gate and wait for the lieutenant and sergeant. Grievant did so, and at 4:13 a.m., while waiting at the front gate, he made an entry in the logbook that he had completed another security check.

Grievant had not reported to anyone that he felt ill. Grievant did not want to go home sick that night because he had previously had surgery and utilized a significant amount of sick leave. He thought that going home sick would adversely affect his record. The roving patrol officer and tower officers are required to call the control room officer every half hour to report their status. The control room log for the night at issue reflects that grievant did not call in at 3:58 a.m.⁸

The warden gave grievant the option of resigning or accepting discipline; grievant chose not to resign. The warden issued a Group III Written Notice and removed him from employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to

⁶ Based on both the testimony of those at the hearing and the hearing officer's observations of the facilities and terrain.

⁷ Exhibit 4. Memorandum from shift commander to chief of security, June 8, 2004.

⁸ Exhibit 3. Control Room Log, June 7, 2004.

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 § 2.2-3000 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as a claim of misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁰ 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 Group III offenses, which

⁹ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹⁰ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

are defined identically to the DHRM Standards of Conduct.¹¹ Sleeping during working hours is one example of a Group III offense.

The underlying facts in this case are not in dispute. Grievant admitted that at about 3:44 a.m., he lay down in the roving patrol vehicle because he did not feel well. Thereafter, both a sergeant and the shift commander were unable to obtain any response from grievant despite making about five radio calls to him. Grievant did not call in at 3:58 a.m. as required. At 4:06 a.m., the shift commander and a sergeant found grievant asleep in the patrol vehicle. Grievant acknowledged that he must have fallen asleep although he did not intend to do so. Thus, a preponderance of evidence establishes that grievant was asleep for at least 20 minutes. Sleeping during working hours is a Group III offense.

While acknowledging his offense, grievant contends that his discipline was too harsh for the offense. He cites as evidence four disciplinary actions of other employees during the past three years.¹² In one case (date of offense November 5, 2001), the employee was given a Group III Written Notice and suspended for three weeks.¹³ In that case, an officer dozed for a few seconds while sitting in a chair inside a secure control room with shatter-resistant glass. In a second similar case (September 9, 2002), an officer dozed briefly while seated inside a gun post.¹⁴ He was disciplined with a Group III Written Notice and two-week suspension.¹⁵ A third officer was disciplined with a Group III Written Notice and one-week suspension for briefly nodding off inside a Control room (December 17, 2002). A fourth officer was disciplined with a Group III Written Notice and one-week suspension for sitting with his hat pulled down over his eyes (February 17, 2003). Two of the four employees were found sleeping on a second occasion and both were discharged from state employment.

In each of the above four cases, the agency issued Group III Written Notices and suspended the employees in lieu of removal from employment. The four cases are somewhat similar in two respects. First, the officers found to be dozing or nodding off were observed doing so for relatively brief periods of time. Second, all of the officers were *inside* the institution, and all but one were inside control rooms or gun posts. By contrast, the grievant was found to have been sleeping for an extended period of time – at least 20 or more minutes. More importantly, from an institutional security standpoint, grievant was *outside* the facility at what is essentially the last line of defense – perimeter patrol. If an inmate surprised a dozing officer inside the facility, there are a large number of physical barriers between the inmate and freedom. However, if an inmate

¹¹ Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹² Exhibit 9. Written Notices of four other employees.

¹³ During the grievance process, the discipline was reduced to a Group II Written Notice and a two-week suspension.

¹⁴ Inside the facility, only rubber bullets are used. The only posts with live ammunition are the roving patrol and the towers outside the perimeter fence.

¹⁵ During the grievance process, the suspension was reduced to one week but the Group III Written Notice was upheld.

manages to escape and get outside the perimeter fence, the roving patrol officer is the last barrier between the inmate and the public.

Even more significantly, when grievant was asleep in the pickup truck on an unlighted, unused road, he was vulnerable to anyone from the outside who might be attempting to aid an inmate to escape. Grievant was armed with weapons and ammunition which could have been used against him or others had someone chosen to attack him while he slept. For these reasons, the agency considered grievant's offense to be significantly more egregious than those who nodded off inside protected control booths.

The agency noted that one other employee had been found sleeping while on roving patrol. The agency gave him the same option given to grievant – resign or be removed from employment. That employee elected to resign. Thus, grievant's disciplinary action was consistent with the discipline given to the only other roving patrol officer found sleeping during work hours.

Grievant speculated that perhaps his radio batteries died and that would explain why he did not hear the repeated radio calls. However, grievant admitted that he heard the radio call at 3:42 a.m. announcing that the inmate count had cleared. Therefore, it is unlikely that his radio died only moments later when the sergeant and shift commander attempted to call him. Alternatively, grievant suggested that radio reception near the access road gate is poor. However, grievant offered no proof of either dead radio batteries or poor radio reception. In any case, even if his radio had died and reception was poor, that does not excuse grievant lying down in his vehicle and going to sleep for at least 20 minutes.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and grievant's removal from employment effective June 23, 2004 are hereby 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.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.¹⁶ 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.¹⁷

[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]

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¹⁶ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer