

Issues: Two Group III Written Notices with termination (sleeping during work hours); Hearing Date: 07/11/05; Decision Issued: 07/12/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8102



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8102

Hearing Date: July 11, 2005
Decision Issued: July 12, 2005

APPEARANCES

Grievant
Representative for 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 two Group III Written Notices issued for sleeping during work hours on two separate dates.¹ As part of the

¹ Agency Exhibit 1. Group III Written Notices, issued March 25, 2005.

disciplinary action, grievant was removed from state employment effective March 25, 2005. 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 11 years. He is a Corrections Officer Senior. He has one active prior disciplinary action – a Group I Written Notice for abuse of state time.³ Grievant also has two inactive prior disciplinary actions – one in 1998 for falsification of official state documents.

During the day shift (6:00 a.m. to 6:00 p.m.) on February 26, 2005, grievant and a female corrections officer, both armed, were assigned to guard a female inmate who was in a public hospital. The inmate was pregnant with twins waiting to deliver. The inmate was in a private room with two recliner chairs on either side of the bed. Grievant and the female officer sat in the two chairs throughout the day, watching television and taking breaks as needed. The chairs were positioned at an angle toward the bed so that they could observe the patient and the television at the same time. During the day, the female officer observed grievant recline his chair, fall asleep, and begin snoring on five to six occasions.⁴ Each time she heard grievant snoring, she called his name to wake him up. Grievant would open his eyes and after awhile drift off to sleep again.

The door to the room stayed shut at all times. However, nurses checked on the inmate several times throughout the day. If grievant was dozing when the door opened, the noise of the door opening would cause him to become alert and open his eyes. The inmate told the female officer that grievant had fallen asleep on other days he was assigned to her room. Because it happened so many times during the day, the female officer reported grievant’s sleeping to the watch commander the following day. The female officer had observed grievant doze off on other occasions but did not report it because it was not as frequent as the five to six times in one day that occurred on February 26, 2005.

During the day shift on February 27, 2005, a different female corrections officer was assigned to guard the same inmate with grievant. She observed grievant recline his chair and fall asleep on several occasions. Each time, she initiated a conversation with grievant by calling his name in order to wake him and keep him alert. The inmate told this female corrections officer that grievant had fallen asleep on other days he was assigned to guard her. Three days later, a lieutenant asked the female officer if she had observed grievant sleeping while on duty at the hospital, and asked her to write a report of what occurred.⁵ Both

² Agency Exhibit 1. Grievance Form A, filed April 22, 2005.

³ Agency Exhibit 4. Group I Written Notice, issued June 28, 2004.

⁴ Agency Exhibit 2. Internal Incident Report, March 2, 2005.

⁵ Agency Exhibit 2. Internal Incident Report, March 2, 2005.

female officers stated that the inmate was not taking pain medication or receiving anything intravenously, and that she was alert and awake during the day.

A third female corrections officer, who guarded the patient on February 28th reported that the inmate told her that grievant had been falling asleep in his chair for the previous three days.⁶ A fourth female corrections officer also reported that the inmate had told her the same thing.⁷

During the spring of 2004, grievant was heard snoring while using a restroom locked from the inside. Grievant denied sleeping at that time. Grievant has been diagnosed with obstructive sleep apnea.⁸ When grievant presented adequate medical documentation to the agency in 2003, the agency complied with a physician's request that grievant be assigned to day shift. Symptoms of obstructive sleep apnea include excessive daytime sleepiness, and excessive heavy snoring during sleep.⁹

During the time at issue, grievant was employed in a second job at which he worked from 8-24 hours per biweekly pay period.

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 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

⁶ Agency Exhibit 3. Internal Incident Report, February 28, 2005.

⁷ Agency Exhibit 3. Internal Incident Report, March 1, 2005.

⁸ Grievant Exhibit 3. Letter from physician, October 27, 2003.

⁹ Chapter 173, *The Merck Manual of Diagnosis and Therapy*.

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 the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹⁰

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's policy 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.¹¹ 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 are defined identically to the DHRM Standards of Conduct.¹² Sleeping during working hours is one example of a Group III offense.¹³

Although grievant denies sleeping during working hours, the evidence indicates otherwise. Two eyewitnesses testified credibly that they had observed grievant fall asleep multiple times while on duty. The witnesses' testimony was consistent with their written statements given soon after the incidents. Two other employees submitted written statements stating that the inmate told them that grievant had fallen asleep during the previous three days. While the two written statements must be accorded less evidentiary weight because they contain hearsay evidence, the totality of the testimony and evidence from four separate witnesses outweighs grievant's denial. The agency has shown, by a preponderance of evidence, that grievant was sleeping on duty while guarding a female inmate at a public hospital.

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

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Agency Exhibit 6. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹³ Agency Exhibit 6. *Ibid.*

Grievant denied sleeping, sitting in a reclining chair, reclining the chair, and claimed the inmate was drowsy and sleepy on both February 26 & 27, and taking pain medication via an intravenous line. The witnesses contradicted grievant on each of these points.

Grievant stated that he had never been accused of sleeping while on post or on duty at anytime.¹⁴ However, under cross-examination, grievant admitted that during the spring of 2004, he had been accused of sleeping when a coworker heard grievant snoring inside a locked restroom.

Grievant stated that on February 26th, he had mentioned to the female corrections officer that a child in his household (of whom he is not the biological father) refers to him as Daddy. He contends that the officer did not think it was appropriate for the child to refer to someone who is not their biological father as Daddy. Grievant feels that the female officer falsely accused him of sleeping because of her disapproval of the child calling grievant Daddy. Other than this, grievant could not offer any reason that any of the four corrections officers would falsify their testimony and/or written statements.

Because of grievant's length of service, mitigation was considered. However, grievant has a long history of disciplinary actions, including one for falsification of official state documents. Grievant denied on direct examination that he had any prior disciplinary actions, but in fact had two inactive actions. He also has one active disciplinary action in addition to the two actions at issue herein. Accordingly, the totality of the aggravating circumstances outweigh the mitigating circumstance. Moreover, grievant's credibility has been tainted by his denial of prior discipline, and his denial that he had previously been accused of sleeping on duty.

DECISION

The decision of the agency is affirmed.

The two Group III Written Notices and grievant's removal from state employment are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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

¹⁴ Agency Exhibit 1. Attachment to grievance, April 22, 2005.

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 15 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 15-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.¹⁵ 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.¹⁶

[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]

¹⁵ 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer