Issue: Group III Written Notice with suspension (sleeping during work hours); Hearing Date: 08/17/05; Decision Issued: 08/19/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8126

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8126

Hearing Date: August 17, 2005
Decision Issued: August 19, 2005

PROCEDURAL ISSUE

Grievant did not present any witnesses or offer any documents as evidence during the hearing. Grievant also elected not to testify on his own behalf. The hearing officer informed grievant that he was not required to testify but that the hearing officer could not make assumptions about grievant's position or what he might say if he testified. Further, if grievant elected not to testify, the decision would have to be based solely on the testimony of the agency's witnesses and the documents admitted as evidence. After explaining this to grievant, the hearing officer gave grievant another opportunity to testify; grievant (through his representative) repeated that he did not want to testify.

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 a Group III Written Notice issued for sleeping during work hours.[1] As part of the disciplinary action, grievant was suspended without pay for 30 days. 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.

The building in which grievant worked on the date of the offense housed a total of 63 youthful offenders in three dormitory-style wings. Grievant's post was located in a fully enclosed security office located at the point where all three wings joined the main building so that grievant could see into all three wings. The security office has concrete block walls approximately three feet high and a thick steel mesh cage on the upper two thirds of all four walls. The post order for the post at which grievant worked on December 30, 2004 states: "All officers assigned to this post will stay awake and maintain constant alertness observing inmate activities in their assigned area."[3]

In the week preceding the incident at issue herein, there had been several behavioral problems among inmates in this building. During the week, management imposed various restrictions on the offenders but the behavioral problems continued. On December 28, 2004, the warden ordered a lockdown of the building resulting in all inmates being confined to the building 24 hours a day. Meals were brought into the building. On the evening of December 30, 2004, the inmates were somewhat louder than usual but grievant's last logbook entry prior to the eruption of inmate violence states "Conditions normal."[4]

At about 10:30 p.m., grievant called the shift commander (lieutenant) and reported that an unknown inmate had thrown body powder in his face through the steel mesh cage. The lieutenant arrived in the building at 10:33 p.m. and observed powder on grievant's head, face, and uniform. Grievant went to the rest room to clean up and returned to his post after a few minutes; the lieutenant then left the building at about 10:45 p.m. after telling grievant to be careful and

[1] Agency Exhibit 1. Group III Written Notice, issued April 27, 2005.
[2] Agency Exhibit 1. Grievance Form A, filed May 6, 2005.
[3] Agency Exhibit 3. Facility Post Order #17, June 13, 2002.
[4] Agency Exhibit 4. Building logbook.

alert. Grievant called the lieutenant again at about 10:50 p.m. stating that unknown inmates had thrown water into the cage. The lieutenant returned to grievant's building, viewed the situation, and again admonished grievant to be observant of what was going on. The lieutenant returned to his office at 10:55 p.m. and grievant again called stating that inmates were destroying property. By 11:10 p.m., the lieutenant called the warden who instructed him to activate the strike force.[5] During the next several hours, the inmates totally destroyed the interior of the building and its contents but were not able to break out of the building.[6] By about 4:00 a.m., a negotiation resulted in the surrender of the inmates. All were handcuffed and transferred to a higher security-level corrections center.

During the next two months, the assistant warden undertook an exhaustive investigation involving the interview of involved staff and all 63 inmates. Because the inmates had been transferred to a facility some distance away, it took several weeks to complete all interviews. Several interviewed inmates reported that grievant had been laying back in his chair sleeping when powder was thrown on him. Grievant did not mention this when he wrote his incident report.[7] Grievant was subsequently interviewed by a special agent investigator. During this interview, grievant signed a written statement in which he admitted falling asleep and was awakened by powder being thrown on him.[8]

In determining the level of discipline, the warden noted that the normal discipline for the Group III offense of sleeping during work hours is a Group III Written Notice and removal from state employment. However, the warden felt that grievant's 11 years of employment and an otherwise satisfactory work record constitute mitigating circumstances. Therefore, in lieu of removal, the warden reduced the disciplinary action to a 30-day suspension without pay. The warden emphasized that he did not hold grievant accountable for the damage caused by the inmates; he based the discipline solely on the fact that grievant was sleeping during work hours.

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

[5] For a detailed description of the events that transpired after 10:30 p.m., see Agency Exhibit 2, Shift Commander's *Incident Report*, February 1, 2005.
[6] Agency Exhibit 5. Photographs of building interior following the inmate uprising.
[7] Agency Exhibit 2. Grievant's *Incident Report*, February 7, 2004.
[8] Agency Exhibit 2. *Investigative Interview*, signed by grievant March 11, 2004. Grievant stated: "On December 30, 2004, I fell a sleep (sic) for a second or two. I was subsequently awaken (sic) by some powder being thrown on me. I didn't see who did it."

need for orderly administration of state employment and personnel practices with the preservation of the employee's ability

The inmate riot that occurred on December 30, 2004 was not caused by grievant. The evidence reflects that tensions had been building among inmates for several days. After some behavioral problems, facility management imposed a number of increasingly restrictive sanctions against the inmates culminating in a total lockdown of the building on December 28th. Locking down the wings and confining inmates to the building (even though necessary and appropriate) is more likely than not to exacerbate whatever tensions already existed. The pot just happened to boil over on December 30th when grievant was on duty. It could just as easily have occurred on another night when grievant was not on duty. The warden emphasized that he did not blame grievant for the damage and that the disciplinary action was taken solely because grievant fell asleep.

Grievant argues that no one testified to seeing him sleeping. However the assistant warden, after conducting interviews with 63 inmates, testified that several inmates reported that grievant was asleep when the powder was thrown on him. While such evidence is hearsay, it is nonetheless admissible in an administrative hearing. More significantly, however, grievant admitted in a signed statement that he was sleeping and that he was awakened by the powder being thrown on him. Grievant's signed admission is, *by itself*, sufficient evidence to prove that grievant committed the offense of sleeping during work hours.

The assistant warden's disciplinary referral memorandum to the warden includes information regarding a polygraph examination given to grievant.[13] Grievant objected to admission of the document because of the statutory prohibition against referring to polygraph results in a grievance hearing.[14] The hearing officer admitted the document as evidence because it contained other relevant information. However, the hearing officer admonished the agency that any information relating to polygraph should have been redacted before offering the document. The hearing officer also assured grievant that any information relating to the polygraph would not be considered in making this decision. This decision is based solely on the other evidence presented at hearing.

Grievant knew, or reasonably should have known, that sleeping during work hours is a Group III offense for any state employee. However, as the sole corrections officer assigned to guard 63 inmates, grievant had an even greater responsibility to maintain a high level of alertness while on his post. On December 30th, grievant was aware that the inmate tensions were high and that the entire building had been locked down for the past two days. Thus, on this night, grievant should have had an even more heightened sense of alertness to

[13] Agency Exhibit 2. Memorandum from assistant warden to warden, March 23, 2005.

[14] Va. Code § 40.1-51.4:4.D states: "The analysis of any polygraph test charts produced during any polygraph examination administered to a party of witness shall not be submitted, referenced, referred to, offered or presented in any manner in any proceeding conducted pursuant to Chapter 10.01 (§ 2.2-1000 et seq.) of Title 2.2 …"

the potential dangers inherent in a lockdown situation. Falling asleep under such circumstances is such an egregious offense that a Group III Written Notice is warranted.

Evidentiary Issues

Grievant objected to the admission into evidence of his signed statement. He asserts that he signed the statement during the same interview at which he was given the polygraph examination. However, grievant's signed statement makes no mention of a polygraph examination or polygraph results. The fact that grievant may have signed the admission before or after the examination is not relevant. The fact is that grievant read the document, initialed it in four places, and signed it of his own free will. Accordingly, grievant's written admission standing alone is sufficient to prove that grievant was sleeping.

Grievant also objects that, upon cross-examination, the warden did not provide what grievant considered to be a satisfactory definition of the word "sleeping." Whether the warden's definition was satisfactory to grievant is irrelevant because the fact is that grievant admitted to sleeping. Grievant did not testify and therefore did not dispute his written admission or offer his own definition of sleeping.

Grievant argues that the agency's submission of both polygraph evidence and photographs of damage that occurred subsequent to his falling asleep was prejudicial to his case. The agency knows, or reasonably should know, that referring to polygraph evidence in a grievance hearing is prohibited by Virginia law. Therefore, the agency's failure to redact such evidence could have been intended to be prejudicial. The photographs are part of the entire description of what occurred immediately before, during, and after grievant falling asleep. As such, the hearing officer does not consider the photographs to be unduly prejudicial. In any case, the hearing officer, in weighing the evidence in this case, has given no evidentiary weight either to the polygraph references or to the photographs of damage. This decision is based solely on grievant's written admission and the hearsay evidence that others saw grievant sleeping.

Prompt Issuance of Disciplinary Actions

Grievant also asserts that the disciplinary action was untimely because it was issued almost four months after the offense. One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. As soon as a supervisor becomes aware of an employee's unsatisfactory behavior or performance, or commission of an offense, the supervisor and/or management should use corrective action to address such behavior.[15] Management should issue a written notice as soon as

[15] Exhibit 6. Section 5-10.11.B. *Ibid.*

possible after an employee's commission of an offense.[16] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. However, when, as in this case, a detailed investigation is required, the disciplinary action might not be issued until completion of the investigation. Grievant first admitted to sleeping on March 11, 2005; the discipline was issued the following month. Given the scope and length of the investigation, the issuance of grievant's discipline was not unduly untimely.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. The agency considered these factors to be sufficiently mitigating that it decided to impose a 30-day suspension rather than remove grievant from state employment. Based on the totality of the evidence, the hearing officer concludes that the agency properly applied the mitigation provision.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and 30-day suspension 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 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:

[16] Exhibit 6. Section 5-10.17.C.1. *Ibid.*

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.[17] 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.[18]

[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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David J. Latham, Esq.
Hearing Officer

[17] 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).

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