Issue: Group III Written Notice (sleeping during work hours); Hearing Date: 12/12/06; Decision Issued: 12/14/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8465; Outcome: Agency upheld in full; **Administrative Review: EDR Ruling Request received 12/28/06; EDR Ruling No. 2007-1523 issued 01/25/07; Outcome: HO's decision affirmed – matters of policy to be reviewed by DHRM; Administrative Review: DHRM Ruling Request received 01/30/07; DHRM Ruling issued 05/07/07; Outcome: HO's decision affirmed; Judicial Review: Appealed to the Circuit Court in Wise County on 06/06/07; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8465

Hearing Date: December 12, 2006
Decision Issued: December 14, 2006

APPEARANCES

Grievant
Five witnesses for Grievant
Warden
One witness 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

Grievant filed a timely grievance from a Group III Written Notice for sleeping during work hours.[1] The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for eight years as a corrections officer.

Late on the evening of June 6, 2006, grievant was working in a control room. Among his duties, he must "provide constant surveillance" of the area visible from the control room, and be "especially alert to inmate activities;" "Alertness and careful attention to details are essential."[3] Between 11:00 p.m. and midnight, the Chief of Security (a Major) was using the Rapideye camera system to monitor pods at the facility. As he scanned various pods and control rooms, he observed grievant with his feet on the desk leaning back in his chair with his eyes closed. He used the system's recorder for several minutes to document what he observed. The Rapideye recording reflects that grievant was leaning back in his chair, with his head on his chest and his eyes closed for a 53-second period the first time, and for three minutes and 40 seconds the second time:[4]

11:53:14 p.m.	-	Grievant's feet up on control panel, leaning back in chair, head on chest, and eyes closed.
11:54:07	-	Eyes open and grievant leans forward to panel.
11:55:15	-	Grievant leans back in chair and eyes get heavy.
11:55:52	-	Eyes close.
11:59:32	-	Eyes open.

The Major then reported what he saw to the shift commander and directed that grievant be relieved from his post and checked by the medical department. The officer who relieved grievant did not notice anything unusual about grievant when he arrived to relieve him. A licensed practical nurse (LPN) in the medical department recorded grievant's blood pressure as 160/110.[5] She took only one reading of grievant's blood pressure.

During the evening, the shift commander had also apparently been using the camera system to monitor the corrections officers in control rooms. He called one officer on the phone to direct him to remove from the control panel a bucket that was blocking the camera's view of the officer. He called another officer to direct him to tell a second officer to leave the control room and go the floor.

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[1] Agency Exhibit 2. Group III Written Notice, issued June 20, 2006.
[2] Agency Exhibit 1. Grievance Form A, filed July 17, 2006.
[3] Agency Exhibit 4. Post Order # 47, April 2006.
[4] Agency Exhibit 5. Disc containing recording of C-3 pod, June 6, 2006.
[5] Grievant Exhibit 3. Complaint and Treatment Form, June 7, 2006.

The warden determined that grievant should be disciplined with a Group III Written Notice. However, because of grievant's length of service, otherwise good performance evaluations, lack of any prior discipline, and apparent high blood pressure that night, the warden mitigated the discipline by not removing grievant from employment or imposing any other sanctions. He also did not remove grievant from his assignment to the strike force. Because grievant is on the strike force, he stays in good physical condition by working out and running to maintain his cardiovascular fitness. Grievant went to his physician on June 7th and his blood pressure was normal. Grievant has never had high blood pressure either before or since June 6th. Grievant acknowledged that his eyes were closed but maintains he was attempting to relieve a headache by doing so.

During the past three years, two employees found to be sleeping during work hours have been removed 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 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, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[6]

[6] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

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 of 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.[7] 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 XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.[8] Sleeping during working hours is a Group III offense.

The agency has demonstrated by a preponderance of evidence that grievant was sleeping while on duty in a control booth at a maximum security state prison. The videodisc recording of the incident is corroborated by grievant's admission that his eyes were closed during the period at issue.

Grievant argues, in effect, that because the appearance of sleeping is not the same as sleeping, he should not be disciplined. This argument is not persuasive. For all practical purposes, grievant was asleep because his head was down on his chest, his eyes were closed, he was motionless, not alert, and not performing his duties. At one point, he was observed this way for a period of nearly four continuous minutes. Accordingly, the practical effect of what grievant was doing was precisely the same as if he had been fully asleep. Moreover, sleep means not only the suspension of consciousness but also, "a state resembling sleep; as a state of torpid inactivity."[9]

Grievant objects that the first-step respondent in his case was not his immediate supervisor but was instead the shift commander. However, agency policy requires that the immediate supervisor be the first-step respondent.[10] While the agency was not in compliance with its own procedure, that is not a basis to overturn the disciplinary action. The disciplinary action must be based on the offense committed by grievant. Nonetheless, the agency should in future cases comply with its own policy as well as with the Grievance Procedure Manual.

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[7] Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[8] Grievant Exhibit 7. Operating Procedure 135.1*, Standards of Conduct,* September 1, 2005.
[9] *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.
[10] Grievant Exhibit 5.

Grievant was perplexed that the agency had given consideration to the high blood pressure reading in considering what discipline to issue. Given the evidence in this case, it is more likely than not that the unusually high blood pressure reading obtained by an LPN on the evening of June 6th was erroneous. Grievant has no history of hypertension and his own physician found grievant's blood pressure to be normal the next day. Grievant is in good physical shape. It is probable that the high reading resulted from the sphygmomanometer cuff being incorrectly placed on grievant's arm. Nonetheless, the fact is that the agency gave grievant the benefit of the doubt regarding the high reading because it considered this a mitigating circumstance that was used to *reduce* his discipline. Thus, even though the high blood pressure reading may have been erroneous, it worked to grievant's advantage.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The policy provides for 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 otherwise satisfactory work performance. In addition, grievant may possibly have experienced high blood pressure on the night in question due to a headache. The agency considered all these factors to be mitigating and reduced grievant's discipline from termination of employment to a Written Notice only. Grievant's salary was not reduced and he was not suspended, demoted, transferred, or removed from the strike force (all possible sanctions that could have been imposed). Therefore, it is concluded that the agency's decision was within the limits of reasonableness.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice issued on June 20, 2006 is hereby AFFIRMED.

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:

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[11] 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.[12] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

[11] 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).

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

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Virginia Department of Corrections
May 7, 2007

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8465. The grievant objects to the hearing officer's decision on the bases that he believes the Virginia Department of did not follow its own policy regarding chain of command when he was issued a disciplinary action. The Department of Human Resource Management (DHRM) will not disturb this decision for the reason stated below. The agency head of DHRM has requested that I respond to this administrative review request.

FACTS

The grievant originally submitted his request to the Department of Human Resource for an administrative review. This Agency forwarded the request to the Department of Employment Dispute Resolution for a response because it appeared that all the issues were procedural rather than policy-based. The Department of Employment Dispute addressed all the issues except one. That issue, whether the warden was the proper level of management to determine the disciplinary action, is discussed below.

The Department of Corrections employs the grievant as a Corrections Officer. Among other duties, he was to provide constant surveillance of the area visible from the control room and to be especially alert to inmate activities. Furthermore, "alertness and careful attention to details are essential." On June 20, 2006, the grievant was issued a Group III Written Notice that states, "This written notice is being issued in accordance with procedure 135.1, Standards of Conduct, Sleeping on C-1 Control Room Post on 6-6-06. Any subsequent written notice issued during the active life period, regardless of level, may result in removal." No other disciplinary action was taken against the grievant.

On June 6, 2006, the grievant, while on duty, was observed on camera by the Chief of Security (a major) with his feet on the desk leaning back in his chair with his eyes closed. The Chief of Security reported what he had observed to the shift commander who had another officer relieve the grievant from duty. A nurse on duty checked his blood pressure and someone else drove him home. The warden reviewed the evidence and determined that the sleeping on duty violation warranted a Group III Written Notice. The agency took into consideration his otherwise satisfactory performance and his years of experience and took no further disciplinary action. The grievant filed a grievance, and when he did not receive the relief he sought, he asked for a hearing before an administrative hearing officer. In his decision, the hearing officer determined that the Department of Corrections officials had sufficient evidence to sustain a Group III Written Notice and thus upheld the agency's disciplinary action.

The relevant policy is the Department of Human Resource Management's Policy No. 1.60 that states it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive. Agencies may supplement this policy as they need or desire, as long as such a supplement is consistent with DHRM Policy 1.60. In this case, DOC has developed its own set of standards that parallel those of DHRM Policy 1.60.

DISCUSSION

A hearing officer is authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited action constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite the inconsistency in the interpretation or application of a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy or procedure.

Concerning the issue raised by the grievant (whether the warden should have been the management level employee to determine the disciplinary action), this Agency has determined that, in this instance, the agency in not following its own regulations has no relevance to whether the employee committed the violation. As a practical matter, it is very appropriate for the warden, the highest-ranking individual at the facility, to be involved in determining and approving the level of disciplinary action. In addition, the issue raised by the grievant describes a violation that occurred during the disciplinary deliberations steps. The documentation supports that the grievant was provided due process during the grievance process. This is particularly true in that the individual that heard the grievance at the third step was the Regional Director, the warden's superior. Finally, the grievant was afforded a hearing before a neutral and independent entity, a hearing officer.

In summary, this Agency has determined that even though the agency did not follow its procedures related to who was responsible for deciding the level of disciplinary action, that deviation does not warrant our interfering with the execution of this decision.

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Ernest G. Spratley
Manager, Employment Equity Services