

Issue: Group III Written Notice with suspension, demotion and salary reduction (sleeping during work hours); Hearing Date: 01/30/07; Decision Issued: 02/05/07; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8497; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8497

Hearing Date: January 30, 2007
Decision Issued: February 5, 2007

APPEARANCES

Grievant
Three witnesses 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

Grievant filed a timely grievance from a Group III Written Notice for sleeping during work hours and/or appearing to be asleep in an inattentive

posture.¹ As part of the disciplinary action, grievant was suspended for two days and demoted to corrections officer with a ten percent salary reduction. 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. At the time discipline was issued, grievant was a sergeant.³ Grievant's post order requires that he be alert, attentive and observant at all times.⁴

Grievant worked the night shift on October 2, 2006. During the first several hours of his shift, a surveillance camera located in his office shows that he remained in his office from 11:45 p.m. through 3:36 a.m. except for a one-minute period at 12:10 a.m.⁵ Until 2:55 a.m., other officers entered and exited the office at various times, and a computer printer on grievant's desk printed out documents at times. At 2:55 a.m., the lights in the office were turned out. There was no activity in the office from 2:55 until 3:35 a.m. The following activity is shown on the surveillance recording beginning at 2:55 a.m.:

- 2:55 a.m. - Lights go out in grievant's office. Grievant has not left office since returning at 12:10 a.m.
- 3:21 a.m. - Female corrections officer ascends stairs outside grievant's office and glances through glass door without stopping. She subsequently asserts that grievant was sleeping in his chair.⁶
- 3:35 a.m. - Grievant appears from behind desk and then exits right to the adjacent control room.
- 3:36.00 - Two female corrections officers descend stairs outside office without stopping.
- 3:36:57 - Grievant enters office from control room, exits his office to the stairs and descends stairs.

At about 3:32 a.m., a lieutenant was making rounds and came to grievant's building where he found the outside door open. As he entered the building, he found both sally port doors open as well as an inside door open. He looked into the control booth and saw that the control booth officer was sleeping.⁷ He immediately called grievant to come to one of the pods on the first level; grievant did not respond. After about 30 seconds, the lieutenant called him a second time; grievant responded and a few moments later came to the control booth. During the investigation into the control booth officer's sleeping at his post, he mentioned that grievant had asked him to turn out the lights in grievant's

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 3. Grievant's Employee Work Profile Work Description, October 2004-2005.

⁴ Agency Exhibit 4. General Duty # 20, Post Order # 12, January 27, 2006.

⁵ Although the camera does directly show grievant most of the time, he can be seen walking around in the office, and when he leaves and returns to the office.

⁶ Agency Exhibit 2. Corrections Officer's incident report, October 5, 2006.

⁷ The control booth officer was a probationary employee; his employment was terminated.

office at about 2:55 a.m.⁸ The officer also asserted that he had seen grievant asleep for approximately half an hour.⁹ That led to further investigation and the allegation that grievant had been sleeping in his office.

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.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 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

⁸ Lights in the building are controlled from the control booth.

⁹ Agency Exhibit 2. Control Booth Correction Officer's incident report, October 3, 2006.

¹⁰ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

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 XII 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 a Group III offense.

Grievant denies having been asleep. There is no video evidence showing grievant asleep. Two witnesses testified that they observed grievant asleep. One of those witnesses glanced through the glass door of grievant's office as she passed it on her way upstairs and said that grievant appeared to be asleep in the darkened room. The other witness avers that she saw grievant sleeping as she passed the office when she descended the stairs with the first corrections officer. However, that witness's testimony is not credible. The video recording shows that grievant walked out of his office to an adjoining control room one minute before the two corrections officers walked by his office and, that grievant reentered his office 57 seconds later. Therefore, grievant was not in his office when the second corrections officer claims to have seen him sleeping.

The control booth officer on the first floor stated that grievant was sleeping but his written statement does not explain how he could observe that since he did not see grievant in person and the video recording does not show grievant sitting at his desk. Since this officer did not testify during the hearing, his written statement must be accorded relatively little evidentiary weight.

There is, however, circumstantial evidence that demonstrates that grievant was not active during the period from 2:55 a.m. to 3:35 a.m. During that period the lights in his office were off and no activity was visible; no one entered or exited the office and grievant is not seen moving around in the office. Grievant denied asking the control booth officer to turn off the lights. This denial is not credible because the room became very much darker when the lights went off. If grievant had not asked for the lights to be turned off, he would have asked for them to be turned on but he never did so. Moreover, grievant contends that he did not notice the lights being turned off. The only way a person would *not* have noticed the lights being turned off was if he was asleep. Accordingly, it is more likely than not that grievant did request that the lights be turned off. It may reasonably be assumed that grievant was sitting at his desk but that does not prove whether he was sleeping. Nonetheless, during the time his officers were conducting an inmate count, grievant was not attentive to, or observant of, what was occurring in the pods. Moreover, it appears that grievant became alert only when he received a radio call from the lieutenant at about the time (3:35 a.m.) he got up from his chair.

In summary, although the agency has not carried the burden of proof to demonstrate that grievant was actually asleep, it has shown that grievant

¹¹ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Agency Exhibit 5. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

appeared to be asleep and was not alert, attentive, or observant for at least 40 minutes from 2:55 a.m. to 3:35 a.m. During that period, grievant was sitting in his office with the lights turned off, performing no work, and was in a state of inactivity that was, for all practical purposes, the same as being asleep. This state of total inactivity is not what a corrections sergeant is expected or paid to do.

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. He does not have any active disciplinary actions. The agency did not terminate grievant's employment; in lieu of discharge it suspended grievant for two days and demoted him from a supervisory position. Since grievant was not performing the responsibilities expected of a sergeant, 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, two-day suspension, and demotion with salary reduction are 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.¹³ 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.¹⁴ 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]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.