

Issues: Group III Written Notice (sleeping while on duty) and Termination;
Hearing Date: 01/08/08; Decision Issued: 01/11/08; Agency: DOC; AHO:
Thomas J. McCarthy, Jr., Esq.; Case No. 8763; Outcome: No Relief – Agency
Upheld in Full.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8763

Hearing Date: January 8, 2008
Decision Issued: January 11, 2008

APPEARANCES

Grievant - Did Not Appear
Agency Representative
3 Witnesses for Agency
0 Witnesses for Grievant

DISCLOSURE

After numerous attempts to contact Grievant to set a pre-hearing telephone conference and a hearing date between the Agency Representative, the Grievant and the Hearings Officer, and having no return calls from the Grievant, the Hearings Officer contacted Grievant by regular mail on December 27, 2007, that a hearing date would be set. On January 2, 2008, having not heard from Grievant, the Hearings Officer, both by regular and certified mail, notified the Grievant that a hearing would be held on January 8, 2008. The January 2, 2008, letter listing the time and place for the hearing that was sent by certified mail was signed for by a person listed in personnel records as Grievant's uncle and emergency contact on January 3, 2008

The case was called at 10:00 a.m. on January 8, 2008. The Agency Representative was present with the Correctional Center Acting Warden. After waiting an additional twenty (20) minutes, the hearing proceeded.

ISSUE

1. "Was the issuance of a Group III notice with termination for sleeping on the job proper?"

FINDINGS OF FACTS

Grievant as a full-time employee of the agency was covered by the Virginia Personnel Act.

Grievant was assigned to a Control Room post at the facility. When a Corrections Lieutenant, after several tries to get a door released received no response from the Control Room, he notified the Master Control Post to open a door for him, and when the door was opened, he went into the Control Room and found Grievant in his chair with his head back, mouth open, and his feet up. He notified Grievant's Supervisor who went to the Control Room and confronted Grievant who admitted that "He had dozed off." Grievant later attempted to distinguish between "dozing" and "sleeping".

The facility at the time of the incident did not have inmates in residence, however, it was a time when the facility was being readied for immediate receipt of inmates and all operational procedures had been ordered observed.

Grievant had an active Group II Notice in his file from September 10, 2007. At the time of the Group III Grievant had not grieved the Group II notice in his file.

The Group II notice was for making personal long-distance telephone calls during Grievant's work shift which he initially denied and subsequently admitted.

The Acting Warden testified that she had met with Grievant about the offense, considered Grievant's record and previous Group II Notice in determining the possibility of any mitigation for the incident for which the Group III with termination was issued and had found none.

The incident was admitted in writing by the Grievant and substantiated by credible testimony from two Corrections Lieutenants.

APPLICABLE LAW AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM.

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Department of Corrections Standards of Conduct shall be and are consistent with Department of Human Resources Managements (DHRM) policy which sets the standards for professional conduct and behavior, and corrective actions for unacceptable behavior.

Virginia Department of Corrections Operating Procedure, 135.1 Standards of Conduct effective September 1, 2005, was in effect at the time of the incident in question.

Grievant was given adequate notice of the offense, admitted the offense in writing and was given an opportunity to respond at which time he attempted to differentiate between "dozing" and "sleeping".

Department of Corrections Operating Procedure 135.1, Section XII, sets out offenses for Third Group Offenses (Group III) and defines them as being "... acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

The listing of Group III offenses in Section XII of Operating Procedure 135.1 includes, "8. Sleeping during working hours."

Mitigation was considered. From the evidence all required procedures were followed.

DECISION

From the evidence presented and testimony of Agency employees who appeared to be very credible, the action of the Group III Written Notice with termination was proper, properly done and is hereby sustained.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request;

generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Thomas J. McCarthy, Jr.
Hearing Officer