

Issues: Group III Written Notice (sleeping on post) and Suspension; Hearing Date: 08/07/08; Decision Issued: 08/12/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8903; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8903

Hearing Date: August 7, 2008
Decision Issued: August 12, 2008

PROCEDURAL HISTORY

On January 30, 2008, Grievant was issued a Group III Written Notice of disciplinary action with suspension from January 30, 2008 through February 12, 2008 for sleeping while working at a security post.

On February 26, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 30, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 7, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Corrections Officer at one of its Facilities. The purpose of this position is to "provide security and supervision of adult offenders." Grievant had received prior active disciplinary action. Grievant received a Group III Written Notice with suspension for sleeping on February 6, 2006. His work performance for the Agency was otherwise satisfactory.

Cameras are located throughout the Facility. The Warden can observe the view from each camera using a monitor located in her office. On December 14, 2007, the Warden was watching her monitor and shifting among cameras so she could observe activities in the Facility. She observed Grievant sitting in a control booth. Grievant was sitting at a desk with a computer screen in front of him. Grievant had turned his chair 90° clockwise from the computer monitor and placed his left elbow on the desk. He rested his head on his left hand. The Warden believed Grievant was asleep even though she could not see his eyes through the camera. The Warden called the Records Manager into the Warden's office and asked the Records Manager to look at the camera monitor. The Records Manager observed Grievant from 10:10 a.m. until 10:17 a.m. and concluded that Grievant was asleep. She observed Grievant's head move forward and down and then quickly popped back up. The Records Manager observed people coming to the booth to be let through the gate. Grievant would open the gate without causing anyone to wait. Then he would resume his position with his left hand on his head and appear to be sleeping.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

The Agency argued that Grievant was asleep thereby justifying the issuance of a Group III Written Notice for "sleeping during working hours." Grievant argued that he was not asleep and that the Agency is mistaken in its allegation against him.

There is a difference between being asleep and being sleepy. The Agency has established that Grievant was sleepy; it has not established that he was asleep. None of the Agency's witnesses observed Grievant's eyes to determine whether they were closed for more than an instant. None of the Agency's witnesses were close enough to Grievant to determine whether he showed other signs of sleeping such as a relaxed breathing pattern, snoring, or a failure to respond to someone in close proximity. The Agency's witnesses testified that Grievant was sitting still for several minutes. This is consistent with someone who is sleeping, but it is also consistent with someone who is awake but sitting still. The Agency's witnesses observed Grievant resting his head on his left hand while his left elbow was on the tabletop. This behavior is consistent with someone who is sleeping, but it is also consistent with someone who is awake but prefers to rest his head on his hand. During the hearing, the Hearing Officer observed Grievant showing a preference towards posture consistent with the posture the Agency's witnesses observed on December 14, 2007. In other words, Grievant would slouch slightly forward in his seat, place his left elbow on the table, and raise his left hand towards his head.⁴ Although Grievant did not rest his head on his left hand, he repeatedly touched left side of his head with his left hand. The Records Manager observed Grievant sitting still and then his head would bob forward and then pop back up. This behavior by Grievant is consistent with someone who is sleepy but not necessarily yet asleep. The Records Manager confirmed Grievant's assertion that he was observing people coming towards the control booth and would let them pass through the gate without having to wait. Grievant's ability to attend to anyone needing his assistance shows that he was not inattentive to his duties.

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ Grievant's demeanor appeared genuine and unrecognized by Grievant.

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁵ In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Corrections Officers working inside corrections facilities are serving in dangerous environments. That danger arises because inmates are convicted felons, many of whom have a propensity towards physical violence against other inmates or corrections officers. Grievant’s Facility included maximum security inmates, the most dangerous of all inmates. One of Grievant’s conditions of employment was to be able to use physical force and deadly force, if necessary.⁶ Corrections officers including Grievant are trained to remain vigilant at all times. Grievant was not inattentive at the particular times that other staff required his assistance to pass through the gate. Had those people arrived at the gate when Grievant’s head was nodding forward and then back, however, it is reasonable to conclude that Grievant would not have timely responded to them. In other words, Grievant was not consistently alert at all times while working his post. This amounts to inadequate or unsatisfactory job performance thereby justifying the issuance of a Group I Written Notice. Because Grievant’s disciplinary action is being reduced to a Group I Written Notice, a suspension is not appropriate.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”⁷ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **reduced** to a Group I Written Notice. The Agency is ordered to provide the Grievant with **back pay** less any interim

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

⁶ See Agency Exhibit 4.

⁷ *Va. Code § 2.2-3005.*

earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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.⁸

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer