

Issue: Group III Written Notice with suspension (sleeping on post); Hearing Date: 08/05/08; Decision Issued: 08/06/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8904; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8904

Hearing Date: August 5, 2008
Decision Issued: August 6, 2008

PROCEDURAL HISTORY

On April 2, 2008, Grievant was issued a Group III Written Notice of disciplinary action with suspension from April 5, 2008 through April 10, 2008 for sleeping on the post.

On April 8, 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 5, 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 Senior at one of its Facilities. The purpose of his position is to "provide security and supervision of adult offenders at this facility."¹ No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On March 27, 2008, Grievant was assigned to work at the Hospital. He was responsible for guarding an inmate who was a patient at the Hospital. He sat in a chair in the inmate's room. Medical staff and members of the public could gain access to the inmate's room. Grievant was armed with a pistol.

At approximately 12:45 a.m., the Sergeant was making her security rounds. She entered the room where Grievant was working. When the Sergeant walked into the room, Grievant should have arisen from his chair and acknowledged her presence. Instead, Grievant was slumped in his chair with his head slightly to the left and forward and with his eyes closed. Grievant was asleep. The Sergeant remained stationed at the door for approximately two minutes and observed Grievant sleeping. She called out to Grievant by name and he did not respond. She then approached Grievant, tapped him on his right shoulder, and called out his name again. Grievant awoke, acknowledged the Sergeant's presence and stated "I don't know what to tell you Sarge". The Sergeant instructed Grievant to make an entry into the log book for his post that the

¹ Agency Exhibit 3.

Sergeant was making rounds and then informed him that she was removing him from his post and asked if he understood why. The Grievant replied "yes ma'am, I understand why."

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[S]leeping during working hours" is a Group III offense.⁵ On March 27, 2008, Grievant was working at his post in the hospital room of an inmate. Grievant fell asleep thereby justifying the Agency's issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays in lieu of termination. Accordingly, the Agency's suspension of Grievant must be upheld.

Grievant contends he was not a sleep; at most, he believes he was inattentive because he was focusing on the inmate rather than acknowledging the Sergeant when she entered the room. The Sergeant's testimony was credible. Grievant has not presented evidence of any conflicts he may have had with her or other reasons why she would be biased against him. It is not necessary for the Agency to prove its case beyond any reasonable doubt. It is only necessary for the Agency to present sufficient evidence to establish a preponderance of the evidence supporting the disciplinary action. In this case, the Agency has done so.

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...."⁶ 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

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(8).

⁶ *Va. Code § 2.2-3005.*

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.

Grievant contends the disciplinary action should be mitigated because the Agency has inconsistently disciplined its employees. Grievant has not presented sufficient evidence regarding the details of circumstances of other employees similarly situated to Grievant and who received different discipline from Grievant. There is no reason to believe that the Agency singled out Grievant for disciplinary action. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce 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 from April 5, 2008 through April 10, 2008 is **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. 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.