

Issue: Group III Written Notice with suspension (sleeping on post); Hearing Date: 07/24/08; Decision Issued: 08/05/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8905; 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: 8905

Hearing Date: July 24, 2008
Decision Issued: August 5, 2008

PROCEDURAL HISTORY

On April 10, 2008, Grievant was issued a Group III Written Notice of disciplinary action with five workday suspension for sleeping on post.

On April 28, 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 July 24, 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 He has been employed by the Agency for approximately 24 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked at the Facility. His usual schedule was from 7 p.m. until 7 a.m. On a periodic basis, Grievant would be assigned to work at the Hospital located several miles away guarding inmates receiving medical treatment.

On January 4, 2008, Grievant stopped working at the Facility due to sickness. On January 15, 2008, Grievant had surgery. Grievant believed he had not fully healed from the surgery, so he asked his doctor if he could remain out of work for a longer period of time. The doctor refused. The doctor provided Grievant with a note saying that Grievant could return to work full time without restriction or limitation. Grievant returned to work on February 15, 2008.

Once Grievant returned to work, he mentioned to the Lieutenant that he was not "feeling up to par" and did not wish to be sent to the Hospital to work. He told the Lieutenant that the medication he was taking caused him drowsiness. On April 1, 2008, Grievant explained his concerns to the Captain about being sleepy. Agency managers

¹ Agency Exhibit 4.

at the Facility decided to send Grievant to the Hospital when needed in part because Grievant's doctor had released him to return to work without restriction.

On April 5, 2008, the Agency sent Grievant to work at the Hospital. He arrived at approximately 10 p.m. He did not read his post orders. As the Sergeant was making his rounds at 2:30 a.m. in the morning, he walked into the room with Grievant and the Inmate. The Sergeant observed Grievant sitting in a chair with his eyes closed, head back, feet extended, snoring, and asleep. The Sergeant observed Grievant for approximately 30 seconds.

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 April 5, 2008, Grievant fell asleep in a Hospital room while guarding an inmate. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may issue a suspension of up to 30 work days. Grievant was suspended for five work days. Accordingly, the suspension must be upheld.

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 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-

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*.

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 that his medical condition caused him to be drowsy and that this is a mitigating circumstance. The evidence is insufficient to support this conclusion. Grievant had surgery over two months prior to the date he fell asleep. His doctor provided him with a release to return to work full-time without restrictions. Grievant did not present evidence of any medications that he was taking on April 5, 2008 that might have contributed to his drowsiness.

Grievant contends that he notified his supervisors at the Facility that he should not be moved to the Hospital to work there because of his illness. This argument is unpersuasive. Grievant stated his objections to supervisors several weeks prior to April 5, 2008. When Grievant arrived at the Hospital on April 5, 2008, he failed to notify the Sergeant that he was ill that day. The Sergeant testified that his practice was to rotate his officers every four to five hours. If an officer had a condition or illness requiring attention, the officer could contact the Sergeant and be replaced by another officer. If Grievant had done so when he first became sleepy, the Sergeant could have taken appropriate action.

To the extent Grievant has presented mitigating circumstances, an aggravating circumstance also exists. Grievant was armed with a loaded pistol at the time he fell asleep in the inmate's room. Had the inmate awoken and obtained Grievant's pistol, the consequences could have been deadly.

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 **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.