

Issue: Group III Written Notice with Termination (sleeping while on duty); Hearing Date: 04/01/11; Decision Issued: 04/18/11; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 9544; Outcome: No Relief – Agency Upheld.

Division of Hearings

DECISION OF HEARING OFFICER

In the matter of
Case No. 9544

Hearing Date: April 1, 2011

Decision Issued April 18, 2011

SUMMARY OF DECISION

The agency had found the Grievant was asleep while on duty on November 3, 2010, and December 2, 2010. Thus, the Agency issued the Grievant a Group III Written Notice with termination. The Hearing Officer upheld the Agency's discipline after finding (i) the Grievant violated the standards of conduct by sleeping during working hours and (ii) the discipline was consistent with law and policy and within reasonable limits.

PROCEDURAL HISTORY

On December 17, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal effective December 17, 2010, for sleeping during working hours.

On January 4, 2011, the Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the outcome of the Resolution Steps and requested a hearing. On March 14, 2011, the Department of Employment Dispute Resolution ("EDR") assigned a Hearing Officer to the appeal.

As agreed to by the parties, the Hearing Officer held a pre-hearing conference on March 17, 2011, and subsequently issued a scheduling order.

As scheduled, by agreement of the parties, the Hearing Officer held the grievance hearing on April 1, 2011, at the Agency's office.

Also, at the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party.

Further, the Hearing Officer admitted the Agency's exhibits one through six, and the Hearing Officer's exhibits one through six. Neither party objected to the admission of these exhibits.¹

¹ The Grievant offered no exhibits as evidence.

During the proceeding, the Grievant represented himself and Ms. B (the agency's advocate) represented the agency.

APPEARANCES

Agency's Advocate
Witnesses, including Agency's representative
Grievant
Witness²

ISSUE

Was the Group III Written Notice with termination warranted and appropriate under the circumstances?

BURDEN of PROOF

In disciplinary actions, 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") Section 5.8. A preponderance of the evidence is evidence which demonstrates what is sought to be proved is more probable than not. GPM Section 9.

FINDINGS OF FACT³

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

On December 17, 2010, the Virginia Department of Corrections ("DOC"/"the Agency") issued the Grievant a Group III Written Notice ("Written Notice") with termination.

The Written Notice described the nature of the offense as follows:

Sleeping during working hours: On November 3, 2010, Lt. [G] observed you sleeping in a chair in upper control of HU3, Alpha Pod. He observed you for approximately 2 minutes. You met with Ms. [V], AW and she referred you to Mr. [E] since you currently have two written notices on your record. Then again on December 2, 2010, at approximately 0125 hours, Lt. [G] observed you sitting in a chair in HU 3D with your eyes closed, motionless for approximately 5 minutes. Two

² The Grievant testified on his behalf.

³ The Hearing Officer admitted as evidence all documents and letters presented as exhibits, to include all referenced herein.

occurrences of sleeping on post is unacceptable and constitutes a Group III violation for sleeping on the job. This Group III offense with your current discipline record warrants removal from state service.

On November 3, 2010, the Grievant was on duty as a corrections officer at the prison during the 6:00 p.m. to 6:00 a.m. 12 hour shift. The Grievant was stationed alone in the control room for the prison housing Unit C Pod ("C Pod") which houses 44 inmates on two tiers. Each tier houses 22 inmates. They are considered more serious offenders due to the nature of the offenses these inmates have been found to have committed. Thus, each one is assigned his own prison cell.⁴

The Grievant's responsibilities during his shift on November 3, 2010, included providing safety and security while in the control room. To that end, the Grievant was responsible for monitoring inmates and others in C Pod, to include officers making rounds in that housing unit. Further, duty required him to alert appropriate staff of his observations when necessary to facilitate the safety and security of the unit. He also controlled who entered and exited the C Pod.

When the control room operator is asleep, no protection is provided for staff or inmates in the housing unit.

On November 3, 2010, the Grievant allowed his immediate supervisor, Lieutenant G, to enter C Pod. After Lt. G completed his rounds, he waved his hand signaling to the Grievant that he was ready to exit the C Pod. When the Grievant failed to respond, Lt. G observed the Grievant with his head down and eyes closed for about two minutes. Lt. G then banged on the glass to the control room and called the Grievant by name. Then the Grievant raised his head. Lt. G next counseled the Grievant about sleeping while on the job to which the Grievant denied. The Grievant then allowed Lt. G to exit the C Pod. Lt. G reported the incident to Captain H and the Grievant was relieved of duty.

Thereafter, Assistant Warden V scheduled and notified the Grievant of a hearing scheduled for November 12, 2010, regarding potential disciplinary action due to the above-referenced November 3, 2010 incident. Assistant Warden V met with the Grievant as scheduled, but she referred the matter to the Warden E because the Grievant had two active group notices on his record. Before Warden E could meet with the Grievant regarding any potential disciplinary action about the November 3 2010 incident, the Grievant was accused of sleeping on the job on December 2, 2010.

On December 2, 2010, the Grievant was assigned to duty as the floor officer in housing unit D Pod ("D Pod"). This housing unit consists of 88 inmates, housed on two tiers with 44 inmates on the top tier and 44 on the bottom one. These inmates are deemed less serious offenders than those housed in the C Pod. Thus, the D Pod inmates are housed two per cell and described as a general inmate population.

⁴ By undisputed testimony, the Agency has Level I through Level V prisons. The most dangerous inmates reside in Level V prisons. The Least dangerous inmates reside in Level I ones. The prison involved in this grievance is assigned a Level IV.

The Grievant was the only floor officer on duty at the time and his responsibility was to make rounds and check on the inmates.

Located within the D Pod on the first tier is an interview room for staff, including a corrections officer, to handle paperwork. Employee breaks are prohibited in the interview room.

During the Grievant's assigned shift on December 2, 2010, the Grievant's immediate supervisor, Lt. G, left the second tier of D Pod and arrived on the first tier. In this location, for five minutes Lt. G observed the Grievant in the interview room with his eyes shut and motionless. Immediately, Lt. G warned the Grievant once more about sleeping while on the job. Again, the Grievant denied being asleep. Lt. G relieved the Grievant of his duty and reported the incident to Captain H.

On December 9, 2010, Captain H informed the Grievant of a scheduled meeting with Warden E on December 10, 2010, to discuss potential disciplinary action by Warden E due to the allegations of the Grievant sleeping while on the job on November 3, 2010, and December 2, 2010.

Lt. G has worked for the agency for 15 years; he has worked at the prison since September 25, 2010. Prior to the incidents occurring on November 3, 2010, and December 2, 2010, Grievant's immediate supervisor had not counseled or written a report on the Grievant for any misconduct.

Prior to his termination the Grievant had been employed by the agency for approximately twelve years. The Grievant's most recent performance evaluation rated him a "Contributor" indicating his overall work was satisfactory.

At the time the Agency issued the Group III Written Notice with removal, the Grievant's file/record contained two active disciplinary notices - a Group I Written Notice and a Group II Written Notice.⁵

DETERMINATIONS AND OPINIONS

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/her 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).

Va. Code Section 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

⁵ The Hearing Officer notes that the Grievant did not dispute the facts except those alleging he was asleep while on duty.

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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under Section 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. GPM Section 5.8.

The Commonwealth of Virginia Department of Corrections Operating Procedure, sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁶

These standards provide that Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence. The Standards of Conduct specifically identify "sleeping during working hours" as a Group III offense.⁷

Agency management issued the Grievant a Group III Written Notice with removal on December 17, 2010. That notice described the nature of the offense and evidence as previously mentioned in the "Findings of Facts" section of this decision. The Hearing Officer examines the evidence to determine if the DOC has met its burden.

I. Analysis of Issue before the Hearing Officer

A. Did the Grievant engage in the behavior described in the Written Notice and did that behavior constitute misconduct?

The *Random House College Dictionary* defines sleep as "to allow one's alertness, vigilance, or attentiveness to lie dormant."

1. Agency Testimony/Evidence

In the instant case, the Agency presented eye witness evidence on both occasions that the Grievant was asleep while at work. First, the Agency's witness testified that on November 3, 2010, after the Grievant failed to allow Lt. G to exit C Pod even after Lt. G had signaled the Grievant to do so, Lt. G observed the Grievant with his head down and in an inactive state for about two minutes. Not until Lt. G banged on the glass enclosing the control room did the

⁶ Virginia Department of Corrections Operating Procedure 135.1 I.

⁷ Virginia Department of Corrections Operating Procedure 135.1 XII(A) and (B)(8).

Grievant become alert enough to look toward Lt. G. Subsequently, the Grievant allowed Lt. G to exit. Second, Lt. G testified that on December 2, 2010, while the Grievant was on duty as the floor officer in D Pod, he observed the Grievant in the interview room⁸ motionless and with his eyes closed for about five minutes. Upon further observation, Lt. G observed the Grievant's eyes were red. The Hearing Officer finds Lt. G's testimony clear, unambiguous and credible.

2. Grievant's Testimony/Evidence

The Hearing Officer does note that the Grievant testified that he was awake on both occasions. He attributes closing his eyes on November 3, 2010, to his placing Visine⁹ in his eyes while on duty. Then on December 2, 2010, the Grievant explains he shut his eyes simply to take a break in the interview room.

3. Hearing Officer Findings

The Hearing Officer finds that the Grievant's explanations are dissuasive. Warden E testified that a solution such as Visine would require approval through the granting of a "manifest request" before the product could be brought in the housing unit. Considering the need to maintain a secure, safe environment in the prison and one free of contraband, the Hearing Officer finds Warden E's testimony credible. In addition, the Grievant provided no evidence showing he had obtained the requisite approval to bring Visine in the housing unit. Thus, the Hearing Officer finds unsubstantiated the Grievant's claim of eye closure due to the input of a wetting solution. Moreover, the Grievant testified he was "taking a break" on December 2, 2011, when his supervisor observed the Grievant with his eyes shut in the interview room. The undisputed testimony was that the interview room was a work area and employees must leave the work area when taking a break. Further, the Grievant acknowledged that when he took what he described as "a break" in the interview room no one replaced him as the floor officer. Thus, the Hearing Officer finds that the Grievant's own acknowledgement refutes the claim that he was taking an authorized break.

The Hearing Officer has observed the demeanor of the witnesses, considered the evidence of record, and finds the agency has borne the burden of proof necessary to demonstrate by preponderance of the evidence that the Grievant was sleeping during working hours on November 3, 2010, and December 2, 2010.

Further, the Standards of Conduct provide that Group III offenses include sleeping during working hours.¹⁰ Thus, the Hearing Officer finds the Agency has also met its burden and shown that the Grievant's behavior constituted misconduct.

B. Was the Agency's Discipline consistent with law and policy?

As noted previously here, the Standards of Conduct identify "sleeping during working hours" as a Group III offense that subjects an employee to termination. What is more, the

⁸ The interview room was included as a part of the Grievant's work area while on duty as a floor officer.

⁹ A wetting solution for dry eyes usually purchased over the counter

¹⁰ Virginia Department of Corrections Operating Procedure 135.1 XII(8).

undisputed evidence presented at the hearing showed that when an employee has active disciplinary notices and receives a group III Written Notice that employee is terminated. In this case, when the Grievant received the Group Three Written Notice on December 17, 2011, he had two active notices.¹¹ Agency management found that the Grievant's Group III offense with his current discipline record warranted removal. The Hearing Officer finds nothing inconsistent about the Agency's discipline.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.”¹² EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a ‘super-personnel officer’” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”¹³ More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹⁴

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy.

Next, the Hearing Officer considers whether the discipline exceeded reasonableness. The Hearing Officer has considered the Grievant's most recent performance evaluation and that the Grievant had been employed with the Agency for twelve years. Also, the Hearing Officer has considered that the Grievant drove four hours round trip each work day in his employment with the agency. Moreover, the Hearing Officer has considered that the Grievant requested a barrack at the site of the prison to avoid the long commute and as of the date of his termination he had not

¹¹ The Grievant had an active Group II that the Agency issued on May 21, 2009, for “Failing to Follow Policy” and an active Group I that the Agency issued on April 26, 2010, for “Unsatisfactory Performance.”

¹² Va. Code Section 2.2-3005 (c)(6)

¹³ *Rules for Conducting Grievance Hearings* VI(A)

¹⁴ *Rules for Conducting Grievance Hearing* VI(B)

received a barrack¹⁵

Having considered this evidence and the Agency's discipline, the Hearing Officer finds the discipline was reasonable.

DECISION

For the reasons stated here, the Hearing Officer upholds the Agency's issuance of a Group III Written Notice with removal.

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 review 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. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th floor Richmond, VA 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 that the decision is not in compliance. The director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 23219 or faxed 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

¹⁵ The Hearing Officer also notes that the Agency merged the two sleeping incidents and issued the Grievant only one Group Three Notice.

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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

Entered this 18 day of April 2011.

/s/Ternon Galloway Lee

Ternon Galloway Lee, Hearing Officer

cc: Grievant
Agency Representative
Agency Advocate
Hearings Program Director of EDR