

Issue: Group III Written Notice with Suspension (sleeping during work hours); Hearing Date: 02/03/17; Decision Issued: 02/09/17; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10921; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10921

Hearing Date: February 3, 2017
Decision Issued: February 9, 2017

PROCEDURAL HISTORY

On September 26, 2016, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for sleeping during work hours.

On October 3, 2016, 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 December 13, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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. He began working for the Agency in January 2014. No evidence of prior active disciplinary action was introduced during the hearing.

On September 17, 2016, Grievant and Officer 1 were in the Hospital providing security for an Inmate. The Inmate was shackled to the bed. The Inmate was ill and had a machine enabling him to breath.

Grievant and Officer 1 were seated in a two person couch at one end of the room. The room was rectangular and accommodated only one patient bed for the Inmate. If Grievant were facing North, the Inmate's bed would have been to the North East. A television was on the wall to the West.¹ The door to the room was located to the North but on the other side of the Inmate's bed from the couch.

Grievant was in uniform and wearing a bullet proof vest. He carried a Glock handgun with ammunition in his weapon belt. Officer 1 wore similar apparel.

During the night, Grievant and Officer 1 interacted with each other and with staff. They sat on the couch and turned their heads to the left to watch the television. At approximately 7 a.m., the Nurse came into the Inmate's room and believed Grievant

¹ The Nurse reported that Grievant's head was slumped to the side. This observation could be explained because Grievant had to turn his head to the left to view the television.

and Officer 1 were sleeping. She notified the Agency and sent an email to the Lieutenant stating:

Per our conversation this morning, I am sending an email including details surrounding a situation involving the 2 shift prison guards for the [Inmate] in room [number] on [Unit]. This morning at approximately 07:00, I looked into [the room] as I was walking by, and noticed that the 2 prison guards appeared to be sleeping, while seated on the couch in the patient's room. Both of the guards had their eyes closed and their heads slumped to the side, covered in blankets. I immediately asked another ... RN to witness, what I was suspecting, that the guards were asleep. [Ms. S] came to the room and witnessed that the 2 guards appeared to be sleeping. I immediately turned the room lights on and loudly said "are you supposed to be sleeping on your shift?" The guards quickly adjusted their positioning and the female guard said "I'm not sleeping, I am watching a movie." I did not respond after that and moved this issue forward, emailing my Unit Manager and Unit Assistant Manager. I also spoke to the ... Shift Managers during their handover of care that this issue needed to be escalated. ***

Also I was informed by [Ms. S], while she was [by] the patient's bedside ... RN, she witnessed several times when she and 2 other ... staff nurses ([Ms. W] and [Ms. M]), witnesses the two guards appearing to be sleeping throughout the shift.²

The Major later called the Nurse and spoke with her about the incident.

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

² Agency Exhibit 6.

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“[I]nadequate or unsatisfactory job performance” is a Group I offense.⁶ 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.

One of Grievant’s responsibilities was to make the employees at the Hospital feel safe. Grievant did not accomplish this objective. The complaint from the Nurse is sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

The Agency alleged that Grievant was asleep on September 17, 2016. The Agency did not establish this allegation for several reasons. First, the Agency did not present testimony of the Nurse who allegedly observed Grievant sleeping. Neither party asked the Hearing Officer to issue an order to compel the attendance of the Nurse. Second, the Agency relied on the Nurse’s email and the Major’s telephone call with the Nurse. The Major did not take notes of his conversation or write an incident report. This makes it more difficult to confirm the Major’s characterization of the Nurse’s observations and opinions about Grievant’s behavior. Third, the Nurse identified several other people who may have witnessed Grievant sleeping. The Agency did not contact these other employees. Neither party asked the Hearing Officer to issue orders to compel the attendance of these witnesses at the hearing. The Nurse’s hearsay account would have been more persuasive if the Agency had presented statements from the several other supposed witnesses. Without the ability to assess the Nurse’s credibility and opinion, the Hearing Officer cannot conclude that Grievant was asleep on September 17, 2016.

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 Human Resource Management”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.

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(B)(4).

⁷ Va. Code § 2.2-3005.

DECISION

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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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

[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

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