Issue: Group III Written Notice with Termination (sleeping during work hours); Hearing Date: 05/07/15; Decision Issued: 05/08/15; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10585; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10585

Hearing Date: May 7, 2015
Decision Issued: May 8, 2015

PROCEDURAL HISTORY

Grievant was a corrections officer for the Department of Corrections ("the Agency"), with 13 years tenure. On March 11, 2015, the Grievant was issued a Group III Written Notice, with termination, for sleeping on the job. The offense date was January 18-19, 2015.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On April 7, 2015, the Office of Employment Dispute Resolution, Department of Human Resource Management ("EDR"), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for May 7, 2015, the first date available for the parties, on which date the grievance hearing was held, at the Agency's facility.

Both the Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits, respectively. Additionally, the hearing officer admitted two additional exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
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 wi th 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?

Through his grievance filings and presentation, the Grievant requested rescission of the Group III Written Notice and available relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

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 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).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its Standards of Conduct, Operating Procedure 135.1, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant removal. The purpose of the policy is stated:

> The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace

> when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Agency Exh. 3. Sleeping during work hours is specifically stated to be a Group III offense.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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

The Agency employed the Grievant as a corrections officer, and he had been employed there for 13 years as of the offense date. The current Written Notice charged the Grievant as follows:

> On January 18, 2015, Officer [J. F.] submitted an internal incident report to the Watch Office that he had observed [the Grievant] asleep while they both were assigned to the [] visitation shakedown area and that he had to wake him up three times. On January 19, 2015, [the Grievant] advised Lt. [K. C.] that he could barely keep his eyes open while on post in [] serving kitchen. He also advised that he is sure that he was seen by offenders but was unsure if staff saw him in that state.

As circumstances considered, the Written Notice provided:

> [The Grievant] has been employed at [the facility] for 13 years. He has an active Group II Written Notice for Failure to follow Written Policy (Not being alert on post) issued on 01/23/15 for an offense that occurred on 12/26/14. On 1/23/15, [the Grievant] was mandated by HR (at the request of [the assistant warden]) to

present medical documentation that he was fit for duty. He complied and the results indicated he was able to perform his duties without limitations.

The Agency's witness, the assistant warden, chief of security, human resource officer, and corrections lieutenant, testified consistently with the terms of the Written Notice offense, including the significant risks presented when a corrections officer is asleep at his post.

The Grievant elected not to testify, and his questioning and evidence did not refute the factual assertions of being asleep at his post as charged. Through his grievance filings and questioning of the Agency's witnesses, and his witness, a personnel analyst at the Agency's facility, the Grievant asserts that his discipline constitutes disability discrimination because he suffers from sleep apnea, that his sleep apnea is a protected disability, and that his sleeping on the job is caused by his disability.

In conjunction with the issuance of the Grievant's prior Group II Written Notice, the assistant warden referred the Grievant to the Agency's human resource officer "for consideration of being required to have documentation to indicate his is fit for duty. He has been observed sleeping (not alert) on posts and he has indicated that he is experiencing medical issues that are contributing to this issue." Agency Exh. 9. The human resource officer referred the Grievant to the Agency's Employee Assistance Program ("EAP"), and the Grievant reportedly cooperated with whomever was assigned to counsel him in the EAP.

The human resource officer received telephone confirmation and written messages from the EAP that the Grievant was compliant with the EAP appointments and recommendations. Hearing Officer Exhs. 1 and 2. The nature of the EAP recommendations was not presented, but based on the Grievant's compliance with the EAP and the absence of any medical or other documentation indicating the Grievant was not fit for duty, the human resource officer determined that the Grievant was fit to return to work. However, the EAP "does not provide Fitness for Duty evaluations or recommendations." Grievant Exh. 1.

Upon his return to work, the Grievant was subject to the disciplinary process that led to the issuance of the Group III Written Notice with termination. At some point after his offense date of January 18 and 19, 2015, and before his actual termination on March 11, 2015, the Grievant provided the Agency with two medical reports from 2009 establishing his sleep apnea condition. Grievant Exh. 2. The Grievant contends that the employer had the obligation to provide a medical fitness for duty examination for the Grievant that would, presumably, ferret out his disability, show need for accommodation, and provide excuse from discipline. The witnesses testified that the Grievant told them in the January to March 2015 timeframe that he could not get medical appointments and that he could not afford the medical treatment.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the manner, tone, and demeanor of the witnesses, I find all the witnesses credible. The witnesses' testimony and the Grievant's tacit admission of the offending conduct satisfies the Agency's burden to show that the Grievant was guilty of the charged conduct of sleeping at his post and that such conduct constituted a Group III offense warranting termination.

Disability Discrimination

The Grievant bears the burden of showing that the Agency's discipline constituted disability discrimination. After the Agency elected termination, the Grievant asserted that he had a disability and that, presumably, the disability caused his performance issues that could have been alleviated through reasonable accommodation. Thus, the Grievant argues that he has been subjected to a form of discrimination through the alleged failure of the agency to provide a reasonable accommodation for his disability under the Americans with Disability Act ("ADA"). The Grievant asserts that he has sleep apnea. (The only medical evidence of the alleged disability are two medical reports from 2009 that indicate the Grievant suffered from severe obstructive sleep apnea. Grievant Exh 2.)

While the Grievant seemed to assert that the Agency knew or should have known of his alleged disability, he failed to show that he put the Agency on notice of a specific disability or request for accommodation. The medical reports from 2009 are rather remote in time to provide credible evidence of a current condition. Even assuming the 2009 medical reports could be sufficient to establish a medical disability in 2015, there is no evidence that shows the Grievant's conduct was causally related to such medical condition or disability, or that the Grievant requested a reasonable accommodation.

Generally, it is the obligation of an individual with a disability to request a reasonable accommodation. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance. *See Hill v. Kansas City Area Transp. Auth.,* 181 F.3d 891, 894 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination—twice sleeping on the job); *Halpern v. Wake Forest University Health Sciences*, 669 F. 3d 454 (4th Cir. 2012) (plaintiff's request for an accommodation was untimely. The school was not obligated to accommodate plaintiff's disability until he "provided a proper diagnosis... and requested specific accommodation." *Citing Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F. 3d 432 (6th Cir. 1998).

As noted above, *Hill v. Kansas City Area Transp. Auth.* has been relied on by the Fourth Circuit, and it mandates a finding against the Grievant's ADA claim. Additionally, another

reported case strikingly similar to the facts presented in this grievance provides persuasive guidance. In *Parsons v. The Auto Club Group*, No. 12-10907 (E.D. Mich. Aug. 28, 2013), the court rejected the plaintiff's claim that the employer did not accommodate his sleep apnea. The court held that the plaintiff's mentioning his sleep apnea to his immediate supervisor, without a specific request for an accommodation, was not enough to meet the employee's burden to show discrimination. Further, the court in *Parsons* held that the defendant employer had no duty to provide an accommodation in the form of excusing past work misconduct. The ADA does not insulate an employee from adverse action by an employer because of misconduct in the workplace, even if his improper behavior is arguably attributable to an impairment.

The Grievant relies on the holding from *Michaels v. City of McPherson*, Dist. Court, D. Kansas (July 7, 2014) to support his claim for relief. *Michaels* denied the defendant's motion for summary judgment, noting that the defendant city had conceded that the plaintiff, who suffered from sleep apnea, was a qualified individual with a disability. Thus, because there remained a genuine issue of material fact for trial, the Court denied summary judgment. There is no showing here that the Grievant is a qualified individual with a disability. Thus, the *Michaels* opinion does not provide legal support for the Grievant's request for relief.

Further, the Grievant asserts that the Agency was obligated to provide him with a medical evaluation to establish his fitness for duty. While the EAP did not provide a fitness for duty recommendation, the Agency accepted the Grievant's compliance with the EAP and the absence of any contrary medical evidence from the Grievant to conclude he was fit for duty. While the Agency's affirmative fitness for duty conclusion may be tenuous, I find no obligation on the Agency to provide the Grievant with a medical evaluation to assist him in negating his fitness for duty or establishing his disability.

Thus, without any specific evidence that the Grievant's sleeping at work was the result of a covered disability, the failure of the Grievant to bring this to the employer's attention prior to the offending conduct and discipline renders the disability issue out of reach. The Agency has met its burden of proof, and, under the applicable law, the ADA cannot apply to reverse discipline.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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. I find no such circumstances.

Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. The Agency presents a position in advance of its obligation for protection of the public, the inmates, and the staff. The hearing officer accepts, recognizes, and upholds the Agency's important responsibility for public safety. The Grievant's position placed him in a responsible role, and the Grievant's sleeping on post was contrary to the Agency's expectations and instructions. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

Given the nature of a corrections officer sleeping on duty, the risk and impact on the Agency, and the repeated conduct, I find no evidence or circumstances to justify reducing the offense below a Group III level of discipline. A Group III Written Notice with termination is permitted under policy and, thus, falls within the limits of reasonableness, particularly with a prior, active Group II Written Notice.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of Group II Written Notice with termination.

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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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