

Issue: Group III Written Notice with Termination (sleeping during work hours);
Hearing Date: 10/20/16; Decision Issued: 11/07/16; Agency: DOC; AHO:
Sondra K. Alan, Esq.; Case No. 10870; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10870
HEARING DATE: October 20, 2016
DECISION ISSUED: November 7, 2016

PROCEDURAL HISTORY

On July 28, 2016 Grievant was issued a Group III Written Notice with termination for having fallen asleep on June 15, 2016 while several inmates were committed to his care.¹ Grievant appealed the disciplinary action. On September 13, 2016 a Hearing Officer was appointed. On September 20, 2016 a Pre-Hearing Conference was held. The Hearing was set for October 20, 2016.

APPEARANCES

Agency Advocate
Agency Representative as witness
3 additional Agency witnesses
Grievant Advocate
5 Grievant witnesses

ISSUES

1. Whether the Group III Written Notice with dismissal was appropriately applied in accordance with Operational Procedure 135.1² and Department of Correction Policy Action 71?
2. Whether additional policies apply when considering the responsibilities of each party?
3. Whether mitigation was properly considered?

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 actions against the Grievant were

¹ Agency Exhibit 1 – Written Notice for action of June 15, 2016.

² Agency Exhibit 3 – Operational Procedure 135.1 sleeping during work hours.

Policy 71 – not entered as attached to Agency Exhibit 1 – refers to Policy against sleeping on job.

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. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq, the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2012 and in accordance with the Department of Corrections Operations Procedure 135.1³

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.

Additional law and polices will be discussed as they relate to this case. Considered will be the Americans with Disabilities Act,⁴ Family Medical Leave Act⁵ and Department of Corrections Operational Procedure 101.5. ⁶

FINDING OF FACTS

Grievant had been with the Agency for 8 years and had no prior disciplinary actions. In March of 2016 Grievant was moved from night shift to day shift. On several occasions between March of 2016 and May 13, 2016, Grievant orally notified his superior that he was on medication that interfered with his assigned duties. Grievant asked to be relieved from driving on roving duty. Grievant’s superior told Grievant to obtain a physician’s note.⁷ On May 13, 2016 Grievant fell asleep while driving a state vehicle which caused damage to the vehicle. It was not until after this event on May 18, 2016,⁸ Grievant’s superior made known to the Human Resources and the Warden that Grievant had notified his superior that he was taking medication which caused sleepiness. Prior to the May 13, 2016 accident Grievant did not obtain a physician’s excuse.

³ Agency Exhibit 1.

⁴ 42 U.S.C. 12101 et. seq. effective October 11, 2016.

⁵ 29 C.F.R. 825.

⁶ Operation Procedure 101.5 IV G 1, 2, 3, (a,d).

⁷ Agency Exhibit 10.

⁸ Agency Exhibit 10.

After the driving incident Grievant did obtain a physician's excuse on May 17, 2106⁹ which stated Grievant should be relieved from roving (driving a small vehicle) patrol duty due to sedating effects of his medication. Grievant was issued a Group III Written Notice on June 7, 2016¹⁰ for the May 13th matter with 40 days suspension. After receiving the physician's second note on June 9, 2016¹¹ the 40 day suspension was rescinded. This June 7, 2016 Written Notice was not grieved.

On May 26, 2016 Grievant came to Human Resources and signed a Job Assist/Accommodation form requesting he not drive the roving vehicle.¹² A formal letter was sent to Grievant's physician listing the jobs Grievant was expected to do and requested the physician review the list and respond stating disabilities.¹³

On June 9, 2016 Grievant's physician responded repeating that Grievant could not perform the roving (driving vehicle) duty but could perform his other duties provided he was kept active.¹⁴ Grievant was relieved from driving duties and was assigned to patrol duties which required his walking throughout his shift.

On June 10th ranking staff including the Assistant Warden and a Human Resource officer met questioning whether or not Grievant could actually safely meet the tasks required of his work post.¹⁵ There is no evidence that Grievant was requested to give his input nor was he advised at this time he could request Short Term Disability or Family Medical Leave Act.

A meeting was scheduled in the afternoon of June 15, 2016 with the Warden to discuss whether or not Grievant could safely preform his assigned tasks.¹⁶ Before the scheduled meeting on June 15, 2106 Grievant was again observed sleeping while he was assigned to monitor inmates in the facility gym.¹⁷ Grievant being asleep at this time was clearly a safety issue for both Grievant, inmates and public safety. Grievant did not notify his superiors that he felt unable to do his assigned job on that day. Grievant was put on paid leave pending more information from his physician. Although requested by the Agency's Human Resource Office on May 26, 2016 to fully describe Grievant's limitations, the third physician's notes was not received until June 25, 2016.¹⁸ Complete medical records of Grievant medication related problems were submitted as evidence at

⁹ Agency Exhibit 5.

¹⁰ Agency Exhibit 4.

¹¹ Agency Exhibit 8.

¹² Agency Exhibit 6.

¹³ Agency Exhibit 7.

¹⁴ Agency Exhibit 8.

¹⁵ Testimony of Warden on direct examination.

¹⁶ Testimony of Warden on direct examination.

¹⁷ Testimony of Warden on direct examination.

¹⁸ Referred to in Grievant Exhibit 1 timeline.

the hearing¹⁹ but the record is unclear when (or if) the records were ever received by the Agency. On June 17, 2106 Grievant initiated a claim for Short Term Disability Leave until July 28, 2016 based on his physician's request that he be excused from work until July 28th.²⁰ However, there is no evidence presented in this case that any such excuse from Grievant's physician was received by the Agency on June 17, 2016 or any time thereafter.

On July 11, 2016 the Agency sent notice of intent to issue a Written Notice with termination.²¹ Grievant responded by letter on July 26, 2016.²² On July 28, 2016 Grievant was issued a Group III Written Notice for being asleep while assigned to (guard) several acute offenders in disregard of Operational Procedure 135.1 and Department Offense Code 71. Grievant's termination was effective immediately. This being Grievant's second Group III notice in 2 months, no additional mitigating factors were considered.

DISCUSSION

The facts of Grievant falling asleep on two occasions while on duty and that such behavior is identified as a Group III with possible termination action is undisputed by all parties.²³ The issue are that of timing and responsibility. In both cases of the Grievant's sleeping incidents physician's letters were received after the incident occurred. In the first incident Grievant did advise his superior he did not feel competent to fulfill the driving task but the physician letter confirming this disability was not received until after the incident occurred.

After being fully aware from his first Written Notice that sleeping on the job was a very serious infraction of Grievant's duty, Grievant again fell asleep at work. Grievant had been advised he needed detailed reports from his physician as to his disabilities/abilities as it related to his job duties. Human Resources had sent a letter to Grievant's physician and received no prompt reply. Grievant did request Short Term Disability Leave on June 17, 2016 but this was after the fact of both sleeping incidents.

The Agency did not promptly give attention to Grievant's oral request to be relieved from roving duty due to his propensity to fall asleep due to his medication. The Agency did make accommodations as requested in Grievant's physician's notes of May 17th and June 9th. However, the Agency staff did meet on June 10, 2016 after the physicians' June 9th note to consider if Grievant's propensity to fall asleep while on duty presented a more serious safety problem than reported by the physician. Grievant was

¹⁹ Grievant Exhibit 2 and 3.

²⁰ Referred to in Grievant Exhibit 1 timeline.

²¹ Referred to in Grievant Exhibit 1 timeline.

²² Referred to in Grievant Exhibit 1 timeline.

²³ Opening statements of both parties.

not contacted to gather his input on the matter nor was Grievant advised of the possibilities of Short Term Disability Leave or Family Medical Leave Act. Instead, the

Agency decided to table any decision until the Warden returned on June 15, 2016. Unfortunately, on June 15th before the Warden could meet with her staff, Grievant was found by the Warden asleep while expected to monitor inmates in the facility gym. This was a serious threat to Grievant, the inmates and the public.

While Grievant disregarded his duty to properly inform the Agency of his disability, it was the employer's not the employee's, purpose to provide public safety while housing criminally charged, mentally impaired inmates.

Grievant's request on June 17, 2016 for Short Term Disability came after the fact of his two sleeping on the job incidents.

Grievant requested mitigation be considered due to his previous 8 year good record and his medical condition which required his physician to experiment with various doses of various medications to offer Grievant the relief he needed without causing his drowsiness. In fact Grievant's record when considering the June 15th event was a previous May 13th Group III less than 2 months earlier. Grievant's physician's description describing Grievant's condition never actually answered the Agency's questions of the Agency's May 26, 2016 letter to the physician. The June 15th event was a serious safety threat. Grievant felt it unfair he was terminated before he was to return to work but that argument has no substance as he was being disciplined for the action of June 15th. The date of the Written Notice is irrelevant.

In short, the Agency had no positive mitigating factors left to consider.

OPINION

The Agency in this case bears some responsibility for not prioritizing public safety.²⁴ However, it was the Grievant's responsibility to pro-actively supply the Agency with detailed description of his disability²⁵ before and not after serious events occurred. While Grievant was accommodated by the Agency he was not protected by the Americans with Disabilities Act as he did not have a disability that met the definition of a person with a "physical or mental impairment that substantially limits one or more of the major life activities."²⁶ (even with the broader interpretation afforded in the October 11, 2016 revision). Further, the Agency is prohibited from making any accommodation that would affect public safety. While there is some duty on the Agency to make employee's aware of the Family Medical Leave Act, Grievant did not request leave nor did he grieve

²⁴ Department of Corrections Operating Procedure 105.1 IV Grievant (1, 2, 3 [a,d]) in granting accommodations the Department first responsibility must be public safety.

²⁵ Department of Correction Operating Procedure 105.1 IV B(1) necessity of physician certificate

²⁶ 42 U.S.C. 12101 et. seq. effective October 11, 2016

that it was not offered to him.²⁷ As already stated the Agency had a policy duty to consider safety before considering accommodations that comprised safety.

DECISION

While neither of the parties handled this matter in the best possible manner it was ultimately Grievant's responsibility to bring the facts of his condition to the Agency's attention. His propensity to fall asleep was a serious safety matter. For the reason above the action of the Agency being a Group III notice with termination is affirmed.

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

²⁷ 29 C.F.R 825

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.²⁸

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

Sondra K. Alan, Hearing Officer

²⁸ 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.