

DECISION OF HEARING OFFICER

In the matter of

Case Number: 11432

Hearing Date: November 12, 2019

Decision Issued: December 2, 2019

SUMMARY OF DECISION

The Agency had found Grievant violated the rules of conduct in that he slept during work hours, falsified records, and failed to follow instructions. The Agency then issued Grievant a Group III Written Notice with removal. The Hearing Officer found the evidence insufficient to establish that Grievant falsified records and failed to follow the policy. However, the Hearing Officer determined that the Agency showed that Grievant was sleeping during work hours and that the discipline rendered was reasonable and consistent with law and policy for this one offense. Accordingly, the Hearing Officer upheld the Group III Written Notice with removal.

HISTORY

On August 27, 2019, the Agency issued Grievant a Group III Written Notice with removal. This notice asserted that Grievant violated the code of conduct by (i) sleeping during work hours, (ii) falsifying records and (iii) failing to follow agency policy pursuant to "Guideline 49." On September 23, 2019, Grievant timely filed a grievance. The Office of Employment Dispute Resolution (EDR) assigned this Hearing Officer to the matter on October 9, 2019.

The Hearing Officer held a telephonic prehearing conference on October 21, 2019.¹ Based on discussions during the prehearing conference (PHC), the Hearing Officer found that the first available date for the hearing was November 12, 2019. Accordingly, by agreement of the parties, the hearing was set for that date. Among other matters discussed during the PHC was the date for the parties to exchange their exhibits and witness lists and also provide the Hearing Officer with them. Accordingly, it was determined during the PHC that the exchange would take place by 5:00 p.m. on November 5, 2019. Neither party objected to this deadline. On October 21, 2019, following the PHC, the Hearing Officer issued a scheduling order addressing those matters discussed and ruled on during the telephone conference, to include the exchange deadline.² During a subsequent PHC held on November 5, 2019, before 5:00 p.m., the Hearing Officer reminded the parties of this deadline. Nevertheless, the Agency untimely submitted its exhibits and witness list, as the Grievant received them on November 6, 2019, the Hearing Officer on November 7, 2019. Moreover, Grievant failed to submit any exhibits or witness list on his behalf prior to the hearing date.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. The Agency's Advocate requested a witness not previously identified be permitted to testify in lieu of the Grievant's supervisor. The supervisor had been identified in the Agency's exchange as an Agency witness.

¹ This was the parties' first date available for the PHC.

² See Scheduling Order, HO Exh. 3.

The Agency Advocate stated that the supervisor was not available for the hearing. Grievant objected to the request arguing in effect that the supervisor was material to the proceedings and the proposed substitute witness could not fill-in for her. After considering the arguments of the parties, the Hearing Officer sustained Grievant's objection.

Next, discussions ensued regarding the exhibits. The Agency proposed the admission of seven exhibits on its behalf. Although they had not been timely provided to the Grievant, he indicated that he did not object to the Agency's exhibits 1 through 6 being admitted as evidence. Grievant discovered immediately before the taking of evidence during the hearing that he had not received a copy of the Agency's proposed exhibit 7. This exhibit purported to be a DVD video recording of Grievant during a portion of his work hours on July 28 and 29, 2019. Due to this non-notice, Grievant objected to its admission. After considering the arguments of the parties or their representatives, the Hearing Officer determined that the Agency had neither provided a copy of the exhibit to Grievant nor even afforded him an opportunity to review the video. The Hearing Officer also considered the representation of the agency's advocate regarding the agency's policy of not providing such videos to a grievant to maintain the confidentiality of certain information. That said, the Hearing Officer determined that fairness and due process dictate that Grievant receive a copy of the video recording or at least be afforded the opportunity to review it. Such did not occur in this case. In addition, as previously noted, this agency exhibit was untimely submitted and the Grievant objected to its admission. Accordingly, the Hearing Officer sustained the Grievant's objection to the admission of Agency Exhibit 7.

Hence, the Hearing Officer admitted the agency's exhibits 1 – 6. Moreover, Hearing Officer Exhibits 1 through 5 were admitted without objection.

The Hearing Officer also notes that during the course of the hearing, Grievant requested the admission of a written statement. This statement had not been provided to the agency prior to the hearing date. The Agency's Advocate objected, and the Hearing Officer sustained the objection.

At the hearing both parties were given the opportunity to make opening and closing statements and call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant represented himself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (1 witness)
Grievant
Witnesses for Grievant (1), Grievant

ISSUE

Was the written notice with removal warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The agency is a facility under the Department of Behavioral Health and Developmental Services. The facility consist of at least three (3) administrative buildings/offices and five (5) homes. The agency had employed Grievant as a Direct Support Professional (DSP) to provide services to residents of the homes within the facility. Grievant had been so employed for a little over 3 years. He worked the night shift and had been assigned to home #1. His responsibilities included providing supports and services to residents to include, among others, conducting bed checks every 30 minutes and providing toiletry assistance to residents. (A Exh. 1, pp. 10-11; A Edh. 2, p. 1; Testimonies of Security Guard and Grievant).
2. Grievant worked the night shift on July 28, 2019, and July 29, 2019, in home #1. As of those dates, Grievant had worked eight (8) consecutive days and 12 days with only 1 day off due to a staffing shortage. (Testimony of Grievant; A Exh. 1, pp. 10; A Exh. 2, p. 1; Agency Exhibit 6).
3. Grievant describes his working condition on those shifts as stressful because he had not had adequate time away from work. In addition, he indicates that because of having practically little time off and his being constantly on his feet while at work, he was experiencing ankle pain. (A Exh. 1, p. 10; A Exh. 2, p. 1).
4. The staff office (office) in home #1 is furnished with a video camera which was operating during Grievant's shifts on July 28 and 29, 2019. Grievant was aware of this. (Testimony of Grievant and Security Guard).
5. Grievant spent a portion of his shifts on the referenced days in home #1's office. And a video recording exists of at least some of the time Grievant spent in the office on one or both of those shifts. This evidentiary fact is derived from Security Guard's testimony indicating that he viewed at least one hour of the video recording which showed Grievant during his work hours on those days in this office. Security Guard was a credible witness. His testimony revealed that he was familiar with the office. In addition, Grievant testified that he was aware there was a camera operating in the office during his shifts. What is more, Grievant did not contest Security Guard's testimony indicating there was a video recording of Grievant spending some time in the office on July 28 and 29, 2019.

6. Specifically, Security Guard reviewed at least 1 hour of the video recording of the time Grievant was in the office on July 28 and 29, 2019. Security Guard's observations of Grievant in the video were:

(i) Grievant remained still long enough that the motion lights in the office went off and remained off for an extended period;

(ii) Grievant was positioned seated in a reclined position in one chair with his leg(s) propped up on the second chair;

(iii) Grievant remained in this position for more than a brief period;

(iv) Grievant stood up one or two times and stretched. He then resumed his seated and reclined position with his leg extended and propped up in a second chair;

(v) at one point Grievant positioned a cabinet door so that it was opened and hiding his face.

(Testimony of Security Guard).

7. From what Security Guard observed of this video, Security Guard's impression was Grievant was sleeping during his work shift. (Testimony of Security Guard).

8. Grievant admits he positioned himself in a reclining position and elevated his feet to obtain relief from ankle pain he was experiencing. Grievant denies sleeping during work. (Testimony of Grievant; A Exhs. 1 and 2).

9. Nevertheless, during the hearing, Grievant testified that "after a short time, he woke up." (Grievance Hearing Recording, Track 2 at minutes 24:00 through 26:00). Grievant's acknowledgement, coupled with credible testimony of Security Guard, provides sufficient evidence that Grievant fell asleep during his working hours on July 28 or 29, 2019. (Testimonies of Grievant and Security Guard).

Bed Checks

10. Bed checks of residents in home #1 are not conducted in the staff office. The evidence only shows that the video recording reviewed by Security Guard was of Grievant in the office area and not the section of home #1 where residents would be sleeping and Grievant would be conducting bed checks or assisting residents during the night shift. (Testimony of Security Guard).

11. Security Guards do visit homes periodically during a shift to provide security to the facility. However, agency policy does not specify how frequent the visits must be. The specific language stated in the relevant agency policy indicates that visits must take place "several times

per shift.” In this case, Security Guard testified that he made rounds every 3 hours. (Testimony of Security Guard; A Exh. 5, p. 11).

12. From his review of the video, Security Guard suspects that Grievant did not conduct bed checks of residents every 30 minutes during Grievant’s shifts on July 28 and 29, 2019. However, assuming rounds were made every 3 hours by security personnel or Security Guard (as Security Guard indicated was his protocol), the Hearing Officer finds that the agency is unable to meet its burden and show by a preponderance of the evidence that Grievant failed to conduct the bed checks every 30 minutes. (Testimony of Security Guard; A Exh. 5, p. 11).

13. In addition, Security Guard’s impression after reviewing the video is that Grievant left the office for short periods. The Hearing Officer finds it is reasonable to infer that the bed checks could have taken place at the times Grievant left the office. Moreover, security personnel reported to home #1 to obtain Grievant’s signatures confirming the checks had been conducted on July 28/29, 2019. Grievant signed that he had conducted the checks and denies that he did so without having performed the tasks. (Testimonies of Security Guard and Grievant; A Exh. 6).

14. Considering this evidence, the Hearing Officer finds the evidence is insufficient to establish that Grievant failed to conduct bed checks and falsified records when he signed indicating he had done so.

15. Accordingly, the Agency has not met its burden regarding its claims that Grievant did not conduct bed checks pursuant to policy and falsified records.

POLICIES

16. DHRM Policy 1.60 Standards of Conduct identifies “sleeping during work hours” as a Group III offense that may subject an employee to termination even if the conduct is a first offense. (A Exh. 4, p. 9; *See also*, Policy 1.60, Attachment A, Group III Offenses).

17. Agency Programming Guideline Number 48 (Agency Policy 48) provides in pertinent part that “[i]ndividuals receiving general supervision will be visually checked ...at least every 30 minutes when sleeping.” (A Exh. 4, Policy 48 §7(A)). Further this policy states that bedroom monitoring is required at least every 30 minutes when a resident is asleep. (A Exh. 4, Policy 48 §§8 and 15).

18. Agency Programming Guideline Number 49 (Agency Policy 49) also provides in pertinent part that “[n]ight shift staff members must be certain to complete all scheduled bed checks and toileting sessions as scheduled.” (A Exh. 5, p. 10; Agency Policy 49 §9F).

19. Furthermore, Agency Policy 49 § 8(1) states the following:

- I. Staff members should never be stretched out on a couch or chair and never with pillow, sheets and/or blankets. This position indicates inadequate job performance and gives the appearance of

sleeping on duty.

(Agency Exh. 5, p. 9; Agency Policy 49 § 8(I)

GROUP NOTICE AND OTHER FACTS

20. Security Guard is also an Agency investigator for abuse, neglect, and unexplained injuries of residents. Security Guard was investigating an unexplained injury of a resident that occurred on July 28 through 29, 2019. Upon reviewing the video of the shifts on those days, Security Guard observed Grievant's actions suggesting he was sleeping on duty. Subsequently, the Agency issued Grievant a Group III Written Notice for (i) sleeping during work hours, (ii) falsifying records, and (iii) not completing rounds. (Testimony of Security Guard: A Exh. 1, p. 1)

21. Grievant has no prior disciplinary record with the Agency. He believes management was too harsh with him when they removed him from his employment. (Testimony of Grievant).

DETERMINATIONS 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/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 § 2.2-3000 (A) 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 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.³

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department

³ Grievance Procedural Manual §5.8

of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On August 27, 2019, management issued Grievant a Group III Written Notice with removal for the reasons stated in the above section. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer

**Issue: Whether the discipline was warranted
and appropriate under the circumstances?**

A. Did the Grievant engage in the conduct? If so, was the behavior misconduct?

The Agency contends Grievant was sleeping while on duty. Policy 1.60 identifies sleeping during work hours as misconduct. In addition, Agency Policy 49 states that staff should never stretch out on a couch or chair and never with a pillow, sheet, or blanket. This policy continues by notifying staff that such a position gives the appearance of sleeping on duty and indicates inadequate job performance.

Consideration of the evidence reveals that Security Guard testified that he reviewed at least an hour of a video pertaining to shifts Grievant worked on July 28 and 29, 2019. Security Guard testified that he observed Grievant on the video in the staff's office. Specifically, he described the video depicting Grievant in one chair with his leg(s) stretched out in another chair. According to Security Guard, Grievant positioned himself to recline. Moreover, Security Guard observed Grievant being motionless in this position for more than a brief period, as evident by the office's motion lights remaining off. Further, Security Guard described Grievant adjusting the door to a cabinet in the office such that it remained opened which had the effect of hiding Grievant's face. Security Guard also testified that he did observe Grievant elevate himself from the reclining position once or twice, but this was only to stretch. Then Grievant returned to the reclining position. From his review of the video, Security Guard formed the opinion that Grievant may have been asleep.

While Grievant testified at one point during the hearing that the "sleeping while at work" claim was a lie, later when testifying Grievant admitted to falling asleep. Specifically, in response to a question asked during the hearing Grievant stated, "after a short while, I woke up."

The Hearing Officer had an opportunity to observe the witnesses during the hearing and finds the Security Guard's testimony credible. Moreover, the evidence demonstrates that Grievant was in a reclining position in the staff office for more than a brief period of time. This gave the appearance of his being asleep. In fact, Grievant admitted having his leg stretched out. In addition, the evidence establishes Grievant had worked 12 days with only one day off during this period. This condition presumably made him susceptible to fatigue and prone to fall asleep. In addition, Grievant's testimony contradicted itself. After careful consideration of the evidence, the Hearing Officer finds that more likely than not, Grievant was sleeping while on duty. Such behavior is misconduct.

Accordingly, the Hearing Officer finds the Agency has shown by a preponderance of the evidence that the Grievant slept while on duty and this behavior is misconduct.

Regarding the Agency's allegations that Grievant failed to conduct bed checks every 30 minutes and then falsified records to claim he did so, the Hearing Officer finds the agency has not met its burden.

This is the case because the agency relies heavily on Security Guard's testimony about the video to establish that Grievant engaged in the alleged conduct. The evidence establishes that Security Guard did not observe Grievant on the video recording in the area where Grievant would conduct bed checks. Security Guard only suspects from his review of the video that Grievant failed to conduct bed checks of residents every 30 minutes during Grievant's shifts on July 28 and 29, 2019. Moreover, even considering security personnel visited home #1 for safety checks every 3 hours (as Security Guard indicated is his protocol), such would not give security personnel the ability to observe Grievant at the frequency needed to confirm whether Grievant conducted the checks.

Furthermore, Security Guard's impression after reviewing the video was that Grievant left the office for short periods. The Hearing Officer finds it is reasonable to infer that the bed checks could have taken place at the times Grievant left the office. Moreover, security personnel reported to home #1 to obtain Grievant's signatures confirming the checks had been conducted on July 28/29, 2019. Grievant signed that he had conducted the checks and denies that he did so without having performed the tasks.

Considering this evidence, the Hearing Officer finds the evidence is insufficient to establish that Grievant failed to conduct bed checks and falsified records when he signed indicating he had done so.

Accordingly, after careful consideration of the evidence, the Hearing Officer finds the evidence is not sufficient to show this conduct.

B. Was the discipline consistent with policy and law?

As indicated previously, the evidence shows that the Agency has met its burden and shown that Grievant was sleeping during work hours.

Further, the evidence illustrates that Standards of Conduct, Policy 1.60 identifies sleeping while on duty as a Group III Offense. What is more, the first occurrence of such an offense can warrant termination.

Grievant contends that others have done worst and were not disciplined as harshly as he. Grievant provided no evidence of disparate treatment. Also, Grievant argues that because this is his first misconduct, his punishment should have been less severe. As noted above, an agency has authority to terminate an employee for a group three offense even if this is the employee's first act of misconduct. Here the agency chose to do so. Its election is not contrary to law or policy.

The Hearing Officer finds the Agency's discipline is consistent with policy and law.

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 the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁴ 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.”⁵ 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 discipline if it is within the limits of reasonableness.

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 that Grievant engaged in the conduct described in the group notice and that the behavior was misconduct. And further, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

⁴ Va. Code § 2.2-3005 and (c)(6)

⁵ *Rules for Conducting Grievance Hearings* VI(A)

In his plea for reversal of the discipline, Grievant claims he has worked for 3 years and one month before every being disciplined by the agency. And because he has no prior disciplinary record he should not be terminated. As previously mentioned, Grievant also contends disparate treatment. Beyond making the allegation, he offers nothing to substantiate his claim. He also complains of working 12 days with only one day off due to a staffing shortage.

After careful consideration of all the evidence whether specifically mentioned or not, the Hearing Officer finds the Agency had the option of issuing Grievant less severe discipline. However, the agency decided not to. That said, the Hearing Officer cannot find the discipline is unreasonable.

DECISION

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

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and 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.

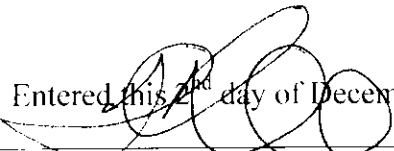
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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]

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

[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].


Entered this 2nd day of December, 2019.

Fernon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant
EDR's Director of Hearings