



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11694**

Hearing Date: August 16, 2021  
Decision Issued: September 7, 2021

**PROCEDURAL HISTORY**

On March 24, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for putting public safety in jeopardy.

On April 20, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 10, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2021, a hearing was held by remote conference.

**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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 employed Grievant as a Corrections Officer at one of its facilities. Grievant had prior active disciplinary action. On July 23, 2020, Grievant received a Group III Written Notice with a five workday suspension for violating a safety rule where there was a threat of physical harm.

On February 15, 2021, Grievant and Officer T were at the Hospital supervising an ill Inmate. The hospital room had a bed for the Inmate and a reclining chair placed next to the Inmate's right when he was in the bed. Grievant sat in the reclining chair. Officer T was also in the room. Grievant unhooked his duty belt containing his weapon. Grievant expanded the leg rest of the chair to support his legs. He loosened and partially removed his left shoe and slightly curled his left leg. Grievant leaned back in the chair. With his head against the back of the chair, Grievant tilted his head to his left and turned his head slightly to his left. Grievant closed his eyes and "dozed off."

The Inmate was in his bed while Grievant was sitting in the chair. Grievant was not focusing on the Inmate. He was not alert.

Officer T had stepped outside of the room briefly to stretch his legs. The Inmate got out of his bed to use the restroom. He stood over Grievant. Grievant did not realize the Inmate was out of his bed. Officer T re-entered the room and asked the Inmate what

he wanted. The Inmate said he wanted to go to the restroom. Grievant was not aware of or react to Officer T's conversation with the Inmate.

Officer T took pictures of Grievant in the chair because Officer T believed Grievant was asleep and posed a security risk if the Inmate had obtained Grievant's weapon. Grievant remained in the chair for more than an hour.

## **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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>1</sup>

Operating Procedure 135.2 governs Rules of Conduct Governing Employees Relationships with Offenders. Section II(C)(1) provides:

Employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of DOC operating procedures.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with applicable established written policy" is a Group II offense.<sup>2</sup>

On February 15, 2021, Grievant was in a reclined position in a chair positioned within a few feet of the Inmate. His legs were up as he slouched in the chair. His eyes were closed. He was not alert to detect and prevent escapes by the Inmate. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

The Agency has presented sufficient evidence to elevate the Group II offense to a Group III offense. Grievant was in possession of a weapon while he was not alert. The Inmate could have accessed the weapon and harmed anyone in or coming into the room. The Agency has presented sufficient evidence to support the issuance of a Group III

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<sup>1</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

<sup>2</sup> See, Virginia Department of Corrections Operating Procedure 135.1.

Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant denied he was sleeping but admits he might have "dozed off for a second or two." Although the Agency could have charged Grievant with sleeping, it charged Grievant with failing to be alert. Grievant admitted to "dozing off" which is an admission that he was not alert. The Agency presented a picture of Grievant with his eyes shut and testimony of Officer T who observed Grievant in that position with his eyes shut for a lengthy period of time. The Agency has presented sufficient evidence to support its allegation that Grievant was not alert throughout his shift.

During the Agency's due process, Grievant submitted a statement indicating he was taking a prescription medication. Grievant did not present any evidence during the hearing to show that he was taking medication which prevented him from performing his work duties.

Grievant contested the Agency's factual presentation but did not submit any credible evidence to counter the Agency's witnesses.

*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 ...."<sup>3</sup> 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 the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

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<sup>3</sup> Va. Code § 2.2-3005.

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 Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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

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