



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11700

Hearing Date: August 26, 2021
Decision Issued: September 15, 2021

PROCEDURAL HISTORY

On January 29, 2021, Grievant was issued a Group III Written Notice of disciplinary action for sleeping on post.¹ On April 28, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping on post and not possessing a radio.

On April 29, 2021, Grievant timely filed a grievance to challenge the Agency's actions. The matter advanced to hearing. On May 24, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 26, 2021, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

¹ The Agency conceded that this Written Notice was part of the grievance hearing.

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 Juvenile Justice employed Grievant as a Resident Specialist I at one of its facilities.

On December 18, 2020, the Operations Manager was conducting rounds. The Operations Manager entered the Unit and observed Grievant in the back sleeping. The Operations Manager walked to Grievant and looked at Grievant who was not moving. The Operations Manager raised his hand to inform Grievant he was present but Grievant did not notice. The Operations Manager approached the table where Grievant was seated and said, "Hello" but Grievant did not respond. The Operations Manager looked at Grievant for at least 45 seconds and observed that Grievant's eyes were closed. Grievant was seated in a chair, leaning back, with his head back. Grievant's radio was on a desk in front of Grievant. The Operations Manager took Grievant's radio and Grievant did not notice. The Operations Manager walked away with the radio and approached another employee and told that employee to go wake up Grievant. The Operations Manager told Grievant that if he gets sleepy, he needs to get up and walk around.

On March 21, 2021, Grievant was working in a room in the Unit where several residents were asleep on cots. Grievant sat in a chair at the end of the room. He extended

his legs and rested his heels on an empty cot. At approximately 1:52 a.m., Mr. L came into the room and observed Grievant seated, with his feet on the cot, and head turned to the side. Grievant was asleep. Grievant did not acknowledge Mr. L. Mr. L approached Grievant, leaned over and used his right hand to tap Grievant on his right leg to awaken Grievant. Mr. L told Grievant to be alert at all times. Mr. L asked Grievant for his radio. Grievant pulled his feet off the empty cot and placed them on the ground. Mr. L questioned Grievant about the location of Grievant's radio. Grievant leaned forward in his chair, stood up and walked away from the chair, out of the room, into a hallway, and into an office. Grievant's radio was in the office. Grievant exited the office holding his radio. He returned to the room and sat in the chair. He placed the radio on a table next to the chair.

If Grievant was asleep while working, a resident could assault him or another resident or take Grievant's keys to escape the location.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[S]leeping during work hours" is a Group III offense.³

DJJ SOP VOL IV 4.1-2.08, Radio Communications, outlines the proper use and maintenance of the radio communications system and compliance with applicable Federal Communications Commission (FCC) laws and regulations. This policy required Grievant to, "Carry a radio affixed to your person while actively supervising residents."

Group III Issued January 29, 2021

On December 18, 2020, Grievant was working in the Unit. Grievant was seated in a chair, leaning back with his eyes closed. Grievant was asleep. Grievant did not respond to the Operations Manager because he was asleep. The Operations Manager was able to take Grievant's radio without Grievant noticing. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping while on duty.

Grievant presented evidence of medication he was taking that he asserted may have caused drowsiness. Grievant did not establish he informed the Agency he was

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

taking that medication before beginning his shift and did not establish that the medication caused him to be asleep. There is no basis to reduce the disciplinary action based on the medications Grievant was taking.

Group III Written Notice Issued on April 28, 2021

On March 21, 2021, Grievant was working in a room where several residents were asleep on cots. Grievant sat in a chair at the end of the room. He extended his legs and rested his heels on an empty cot. Grievant fell asleep. Grievant did not acknowledge Mr. L when Mr. L approached him because Grievant was asleep. Grievant was required to have his radio with him but he left it in the office. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours. 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 argued he would was not asleep. The Agency, however, presented sufficient credible evidence to support the issuance of a Group III Written Notice.

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"⁴ 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 dated January 29, 2021 is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal dated April 28, 2021 is **upheld**.

APPEAL RIGHTS

⁴ 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 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]

[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

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