



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11612

Hearing Date: February 8, 2021

Decision Issued: February 9, 2021

PROCEDURAL HISTORY

On September 17, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for sleeping during work hours.

On October 5, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 20, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 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. He had prior active disciplinary action.

On August 8, 2020 at approximately 1:30 a.m. or 2 a.m., Grievant was working as the Control Booth Officer in the Building. He was responsible for opening doors to allow people to enter the Building. The Building had a large exterior window and the Control Booth had a large window. Someone standing outside of the Building could look through both windows and see an employee working in the Control Booth. An employee working in the Control Booth would be able to see people seeking entry into the Building. The distance between Grievant and the Building exterior window was approximately 15 to 20 feet.

An employee sitting in the Control Booth also could see through interior windows into the A side and B side of the Building. The Control Booth had an opening called a slot that allowed the Control Booth Officer to pass items to or speak with a Floor Officer working in side A or side B.

Grievant could hear radio calls while working in the Control Booth. The Control Booth had a telephone accessible to the Control Booth Officer.

At 3:45 a.m. on August 8, 2020, the Lieutenant sent an email containing his statement of his interaction with Grievant a few hours earlier. No other witnesses drafted statements about the incident.

CONCLUSIONS OF POLICY

The Agency alleged that Grievant was asleep while on post, a Group III offense. When the Agency's evidence is considered as a whole, the Agency's evidence is contradictory and not sufficiently credible to meet the Agency's burden of proof. The disciplinary action against Grievant must be reversed.

The Agency presented testimony of Sergeant 1 and the Lieutenant. The Hearing Officer requested and the Agency provided a copy of the Lieutenant's statement about the incident.

The Agency's evidence was inconsistent regarding who was making rounds on August 8, 2020. Sergeant 1 testified that he and the Lieutenant were making rounds on August 8, 2020 at approximately 1:30 a.m. or 2 a.m. The Lieutenant testified he and Sergeant 1 were making rounds on August 8, 2020. The Lieutenant's statement says the Lieutenant, Sergeant 1 and Sergeant 2 were making rounds on August 8, 2020 when they approached the Building to gain entry. It is difficult for the Hearing Officer to believe that within an hour or two of the incident, the Lieutenant would fabricate the existence of Sergeant 2 if Sergeant 2 was not actually with the two other men. In other words, it is most likely that three employees approached the Building on August 8, 2020 yet neither the Lieutenant nor Sergeant 1 testified Sergeant 2 was with them. The Lieutenant's statement said, "[Sergeant 2] attempted to knock on the front door again for a couple minutes and no response." If this statement was true, both Sergeant 1 and the Lieutenant would have testified that Sergeant 2 was present.

The evidence was inconsistent regarding what part of Grievant's body was observed. Sergeant 1 testified he could not see the front of Grievant's face. Sergeant 1 said he could only see the back of Grievant's head and not Grievant's eyes. The Lieutenant testified he clearly could see Grievant's head and "whole face." The Lieutenant said Grievant's eyes were closed and Grievant was sleeping. There was no doubt in the Lieutenant's mind that Grievant was asleep. Sergeant 1 and the Lieutenant were next to each other while they attempted to gain entry into the Building and should have been able to see the same things.

The evidence was inconsistent regarding whether a Floor Officer was working at the time of the incident. When asked if any other officers were in the Building, Sergeant 1 testified the Floor Officer was on break. The Lieutenant testified the Floor Officer was present in the Building on side B and interacted with Grievant.

The evidence was inconsistent regarding how Grievant was supposedly awoken from his sleep. Sergeant 1 testified that Grievant did not respond when the Lieutenant

“blinked” his flash light several times towards Grievant and that Grievant did not respond to several radio calls. Finally, a radio call was made to an employee in another building who called the telephone near Grievant. According to Sergeant 1, Grievant jumped out of the chair in response to the sound of the telephone ringing. Grievant then answered the phone and realized the Lieutenant and Sergeant 1 were outside of the Building waiting to enter. The Lieutenant testified that he flashed his light at Grievant, knocked on the door and glass and made radio calls to Grievant without Grievant responding. The Lieutenant testified that the Floor Officer went to the slot and began speaking to Grievant. The Floor Officer got Grievant’s attention and the Grievant let the Lieutenant and Sergeant 1 into the Building. The Lieutenant wrote in his statement, “I finally called via radio to Housing Unit 3 control [Grievant] and witnessed him jump up out of the chair and open the door.”

It is not unusual for two people witnessing the same event to have slightly different accounts of what they observed. It is unusual for two witnesses to have significantly different accounts of events and for one of those witnesses to have contemporaneously drafted a statement that materially contradicts his own testimony. Although both Sergeant 1 and the Lieutenant were testifying truthfully, their recollections were materially flawed to the point it is unclear whether they were both talking about the same employee (Grievant) and what behavior they observed. It cannot be the case that two witnesses would forget that a third employee was with them making rounds and trying to get Grievant’s attention. It cannot be the case that Grievant was awoken by a telephone call and was awoken by the Floor Officer and awoken by a radio call. The Warden testified and tried to explain the disparities in the Lieutenant’s testimony. She opined that the Lieutenant had confused Grievant’s incident with a similar incident involving another employee. She believed the Lieutenant’s statement was the correct version. Even if the Hearing Officer were to adopt the Lieutenant’s statement that statement says Grievant was awoken by a radio call. Sergeant 1 testified that several radio calls were made and none of those calls awoke Grievant. A telephone call, not a radio call caused Grievant to awake according to Sergeant 1.

The disparities in the evidence were so great that no level of disciplinary action can be upheld.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant’s same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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 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.



COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11612-R

Reconsideration Decision Issued: March 29, 2021

RECONSIDERATION DECISION

The Office of Employment Dispute Resolution remanded this matter to the Hearing Officer:

Accordingly, EDR must remand the decision for additional findings and clarification as to the significance and reliability of the evidence as to whether the grievant was asleep during work hours. If the hearing officer deems all of the undisputed evidence unreliable as to the charged misconduct, such that no findings of fact are possible on that issue, the hearing decision should clearly identify the grounds for rejecting the evidence. To the extent the hearing officer's reconsideration hinges on evidence contained in the Lieutenant's written statement – which was produced only after the hearing proceedings and was thus not explored in testimony – the hearing officer may, in his discretion, reopen the record to pose questions and/or take additional evidence in connection with the Lieutenant's contemporaneous statement and/or related matters as determined appropriate.

The Written Notice alleged:

On 8/8/20, you were observed sitting in a chair slightly tilted to the right with your hands over your head asleep in Housing Unit 3 by [the Lieutenant] and [Sergeant 1]. [The Lieutenant] knocked on the front door several times along with pulling on the door. The Lt. and Sgt. both shined their flash lights inside the control room and still no movement. [The Lieutenant] called via radio to

Housing Unit 3 control and you were witnessed jumping out of the chair to open the door. This offense is a Group III, Sleeping During Working Hours.

According to the Warden, the Written Notice was “cut and paste” from the Lieutenant’s written statement to her.

Grievant filed a Grievance Form A and wrote, “I never admitted to being sleep on post and this is an opinion of [the Lieutenant] supported by [the Warden].”

The Hearing Officer presumes employees are properly performing their jobs unless the Agency alleges to the contrary. In those cases, it is a matter of dispute that the Agency’s evidence must resolve in the Agency’s favor. In this case, the Hearing Officer presumes that Grievant was performing his job duties unless the Agency can prove by a preponderance of the evidence that Grievant was not performing his job duties. In other words, Grievant does not have to prove he was awake – the Agency must prove Grievant was “Sleeping During Working Hours.” The Agency has not done so.

The Hearing Officer will not make findings of fact as to whether Grievant was awake or asleep because Grievant does not have to prove he was awake and the Agency has not established that Grievant was asleep. In other words, whether Grievant was awake or asleep cannot be determined. What can be determined is that the Agency’s evidence does not show Grievant was asleep.

Upon review of the evidence, it is clear that the Lieutenant was testifying about another employee and not about Grievant. This is confirmed by the numerous discrepancies between his testimony and Sergeant 1’s testimony and the Lieutenant’s own statement drafted shortly after the incident. This conclusion is further confirmed by the testimony of the Warden that the Lieutenant had confused Grievant with another employee and was testifying about the other employee. Because the Lieutenant was testifying about another employee, the Hearing Officer will give little weight to the Lieutenant’s testimony. Nothing about the Lieutenant’s testimony is sufficient to support any level of disciplinary action against Grievant.

There is no need to receive additional evidence regarding Sergeant 2. The Hearing Officer raised the question of whether Sergeant 2 was involved in the incident. The Original Hearing Decision stated:

It is difficult for the Hearing Officer to believe that within an hour or two of the incident, the Lieutenant would fabricate the existence of Sergeant 2 if Sergeant 2 was not actually with the two other men. In other words, it is most likely that three employees approached the Building on August 8, 2020 yet neither the Lieutenant nor Sergeant 1 testified Sergeant 2 was with them.

Instead of proffering that the Lieutenant was mistaken that Sergeant 2 was involved in Grievant’s case or explaining why no evidence was presented by an employee

who supposedly directly observed Grievant's behavior, the Agency's appeal request asserts:

However, neither [the Lieutenant] or [Sergeant 1] were asked about the other Sgt and neither did they deny the existence of another individual. They were not asked about the presence of another individual and they simply testified as to what their actions were that evening.

The party responsible for asking questions about Sergeant 2 would be the party with access to the Lieutenant's statement – the Agency. The party with the burden of proof, the Agency, has left the existence and role of Sergeant 2 as a mystery. The Agency had the opportunity to resolve the mystery:

- Sergeant 1 testified, "myself and [the Lieutenant] were doing security rounds"
- The Agency's Representative asked the Lieutenant, "When you say you were with another supervisor was that [Sergeant 1]? The Lieutenant responded, "Yes mam, [Sergeant 1]."

Any elaboration on these questions easily could have revealed the existence of Sergeant 2.

The Agency's failure to proffer any credible explanation for the existence and actions of Sergeant 2 renders the Lieutenant's written statement unreliable. The Hearing Officer gives little weight to the Lieutenant's written statement.

The only evidence remaining is that of Sergeant 1. Sergeant 1 testified he was sure that Grievant was asleep. Sergeant 1 was testifying about the ultimate issue in dispute and he was offering his opinion of whether Grievant was asleep. Sergeant 1's opinion is not sufficient to establish that Grievant was asleep.

When Grievant asked Sergeant 1 whether he could see Grievant's eyes, Sergeant 1 was evasive. Ultimately, the Sergeant admitted he could not see the front of Grievant's face and did not see Grievant's eyes closed. Sergeant 1 testified that he knocked on the door and Grievant did not respond. He observed Grievant seated in a chair in a reclined position with his hands behind his head and feet up on one of the counters. Sergeant 1 waited over five minutes without any response from Grievant. At most, Grievant's behavior rises to the level of unsatisfactory work performance for failing to timely notice that Sergeant 1 was outside of the building seeking to gain entry. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance. The Agency has not presented sufficient evidence to support the issuance of a Group III Written Notice for sleeping during work hours.

Grievant had prior active disciplinary action. He received a Group I Written Notice on September 17, 2020, a Group III Written Notice on August 29, 2019, and a Group I Written Notice on February 6, 2019. With the accumulation of an additional Group I

Written Notice, the Agency's decision to remove Grievant from employment must be upheld.

Grievant presented a note dated September 22, 2020 from his medical professional indicating Grievant was in treatment for a medical condition and needed to be placed on day shift due to fatigue. Grievant did not testify regarding his medical condition and the note was created after the Agency took disciplinary action. There is no basis for the Hearing Officer to conclude that Grievant's medical condition was a mitigating circumstance justifying reversal of the Agency's disciplinary action.

DECISION

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

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



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Housing Unit 3 control and you were witnessed jumping out of the chair to open the door. This offense is a Group III, Sleeping During Working Hours.

According to the Warden, the Written Notice was “cut and paste” from the Lieutenant’s written statement to her.

Grievant filed a Grievance Form A and wrote, “I never admitted to being sleep on post and this is an opinion of [the Lieutenant] supported by [the Warden].”

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