

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 12086

Hearing Date: April 10, 2024  
Decision Issued: April 10, 2024

**PROCEDURAL HISTORY**

On January 10, 2024, Grievant was issued a Group III Written Notice with termination.<sup>1</sup> On February 8, 2024, Grievant filed a grievance challenging the Agency's actions.<sup>2</sup> The grievance was assigned to this Hearing Officer on February 26, 2024. A hearing was held on April 10, 2024.

**APPEARANCES**

Agency Advocate  
Agency Representative  
Grievant  
Witnesses

**ISSUES**

Did Grievant violate OP 135.1?

**AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy. The Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct,

---

<sup>1</sup> Agency Exh. 1, at 1

<sup>2</sup> Agency Exh. 1, at 18

<sup>3</sup> See Va. Code § 2.2-3004(B)

and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may decide as to the appropriate sanction, independent of the Agency's decision.

### **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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established that more probably than not occurred, or that they were more likely than not to have happened.<sup>4</sup> However, proof must go beyond conjecture.<sup>5</sup> In other words, there must be more than a possibility or a mere speculation.<sup>6</sup>

### **FINDINGS OF FACT**

After reviewing the evidence and observing the demeanor of each witness, I make the following findings of fact. Agency submitted a notebook containing pages 1 through 112. Without objection, the notebook was accepted as Agency Exhibit 1. Grievant did not submit any documentary evidence.

Two witnesses testified on behalf of the Agency: an Assistant Warden (W1), and a second Assistant Warden (W2). Grievant testified but called no witnesses.

Several Operating Procedures (OP) are relevant to this matter.

OP 135.1, **Standards of Conduct** "...applies to all units operated by the Virginia Department of Corrections."<sup>7</sup>

OP 135.1 (XIV)(A), **Third Group Offenses** states: "*These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include but are not limited to, **endangering others in the workplace...** or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws.*"<sup>8</sup> (Emphasis added)

OP 135.1 (XIV)(B)(8) states: "*Group III offenses include... Sleeping during work hours.*"<sup>9</sup>

---

<sup>4</sup> *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

<sup>5</sup> *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

<sup>6</sup> *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

<sup>7</sup> Agency Exh. 1, at 52

<sup>8</sup> Agency Exh. 1 at 70

<sup>9</sup> Agency Exh. 1, at 71

OP 401.1 **Traffic Control Officer Job Summary** at (6) states: “*Always be observant; maintain a professional and courteous attitude towards offenders, general public and unit personnel.*”<sup>10</sup>

W1 testified that Grievant, on October 27, 2023, was working as the Traffic Control Officer at a medical facility used by the Agency. W1 testified Grievant was armed and it was imperative that he always remain alert. Part of Grievant’s job was to escort inmates from the vehicle that brought them, through the sally port, and safely into the medical facility. Another of Grievant’s duties was to see that inmates were properly restrained and to see that there was no interaction between an inmate and the public.

W1, while making a routine surveillance of this facility, came upon Grievant sleeping. She stood within touching distance for more than 1 minute with no reaction by Grievant. She cleared her throat and still there was no reaction. Finally, she used her phone to tap on a metal door next to Grievant. He was startled and opened his eyes. W1 took a picture of Grievant sleeping at his post.<sup>11</sup> W1 took Grievant to her office where he acknowledged that he was asleep.

W2, after consultation with W1 and viewing the picture of Grievant sleeping, issued the Group III Written Notice.<sup>12</sup> On December 5, W2 presented the Due Process Notification to Grievant.<sup>13</sup> Notes from the Due Process meeting of December 12 indicate that Grievant said “...Yes, picture looks like sleeping he was dizzy and I just closed my eyes. I was not sleeping since my eyes were closed. I can't defend that I wasn't sleeping...My eyes were closed and there is no way I can defend myself..”<sup>14</sup>

Because of prior problems with officers sleeping while on duty, W2 testified that the Agency has adopted a no tolerance policy regarding sleeping while on duty. This change in policy was made clear to all officers, including Grievant, prior to the events of October 27. W2 testified that he took into consideration Grievant’s length of service at the Agency. He also was aware of a prior inactive Group III Written Notice for sleeping on duty and an inactive Group II Written Notice for failure to follow policy.

Grievant testified and did not challenge the testimony of W1 or W2. He stated several times he knew he needed to be alert; I am guilty, but I desperately need another chance. One final last chance.

Based on the evidence produced by the Agency through its documentary evidence and the testimony of W1 and W2, I find that Grievant was sleeping on duty in violation of OP 135.1 (XIV)(B)(8). He was not always observant and thus created a potential safety issue for himself, inmates, and the public.

### **MITIGATION**

*Va. Code § 2.2-3005(C)(6)*, authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an

---

<sup>10</sup> Agency Exh. 1 at 101

<sup>11</sup> Agency Exh. 1 at 3

<sup>12</sup> Agency Exh. 1 at 1

<sup>13</sup> Agency Exh. 1 at 6

<sup>14</sup> Agency Exh. at 12,13

Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings (“Rules”), provide 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 the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency’s discipline was consistent with law and policy, then the Agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the Case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that Grievant has been employed by the Agency, and (5) whether or not Grievant has been a valued employee during the time of his/her employment at the Agency.

I can find no reason for mitigation under the facts presented in this matter.

### **DECISION**

I find that the Agency has borne its burden of proof in this matter and the issuance of a Group III Written Notice with termination for violation of OP 135.1 was proper.

### **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 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 OP 445.4 (II)(E) must refer to a particular mandate in state or Agency OP 445.4 (II)(E) with that 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 where 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].

*William S. Davidson*

William S. Davidson, Hearing Officer

Date: April 10, 2024

---

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