



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12093

Hearing Date: April 4, 2024
Decision Issued: April 23, 2024

PROCEDURAL HISTORY

On November 17, 2023, Grievant was issued a Group III Written Notice of disciplinary action for sleeping during work hours.

On December 11, 2023, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 11, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 4, 2024, a hearing was held by video conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

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 Juvenile Justice employs Grievant as a Juvenile Correctional Specialist at one of its locations. He has been employed by the Agency for over 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

On October 3, 2023, Grievant and the Specialist were working in the Housing Unit. This Unit had an open area surrounded by resident rooms. The rooms had doors that could be locked when residents were inside their rooms sleeping. Grievant and the Specialist could see into the rooms through windows in the room doors. On each room door was a log allowing Grievant and the Specialist to write each resident's status when they looked through the door window to see the resident inside the room.

The open area included two chairs and a table. The backs of each chair were against the wall. One side of the table was against the wall. The chairs were on opposite sides of the table.

Residents were supposed to be checked every 15 minutes. Either Grievant or the Specialist could perform the checks by looking into a resident's room and recording the resident's status.

The Agency presented a video recording showing Grievant and other employees from approximately 6:58 a.m. to 7:35 a.m. on October 3, 2023.

Grievant and the Specialist completed the 7 a.m. check by walking around the open area checking on each resident. Grievant sat in one of the chairs next to the wall and table. The table was to Grievant's immediate left as he sat in the chair.

At approximately 7:05 a.m., Grievant began slouching in the chair and resting the back of his head against the wall. He placed his right arm behind his head with the arm against the wall. He remained motionless but then pulled his right arm down to his side at approximately 7:07 a.m. Grievant continued to slouch in the chair while slightly moving his head. He sat motionless. At 7:10 a.m., the Specialist stood up from his chair and walked out of the room. Grievant sat motionless until 7:10:59 a.m. when he moved his head from left to right. Grievant's head slowly turned back to his left and at 7:11:49 a.m., Grievant turned his head from left to right so that he was facing forward. Grievant's behavior was consistent with someone sleeping lightly. At 7:12 a.m., two employees entered the room.¹ Grievant sat up in the chair. One employee sat down in a chair against the other wall and the second employee walked out of the room. Grievant was awake and continued to move while seated in the chair. At 7:13:15 a.m., Grievant rested the back of his head against the wall and remained in a slouched position motionless. At 7:14 a.m., a Specialist walked to each resident's door and checked on each resident. Grievant remained motionless and unaware of what the other Specialist was doing. At 7:16:40 a.m., the Specialist stood in front of the door next to Grievant. Grievant remained motionless without acknowledging the Specialist. At 7:16:59 a.m., the Specialist sat down in the other chair at the table. Grievant did not seem to notice the Specialist's movement. At 7:18:18 a.m., Grievant moved his head from right to left while his head rested against the wall. Grievant continued to sit motionless. At 7:23 a.m., the Specialist returned to the room and sat down in the chair next to the table. Grievant did not react to or acknowledge the Specialist. At 7:23:23 a.m., Grievant turned his head from his right to his left towards the Specialist without moving the rest of his body. At 7:23:55 a.m., Grievant moved his head so he was looking forward. At 7:24:44 a.m., Grievant turned his head slightly to his right and slightly downward. At 7:26:50 a.m., Grievant moved his head from his right to his left and then faced forward. At 7:27:47 a.m., Grievant moved his head to his left and then shortly thereafter moved his head to his right. At 7:28:56 a.m., Grievant moved his head to face forward. His head then tilted to his right. Grievant remained motionless until 7:34:05 a.m. when he stood up from his chair. He stretched his arms upward and then walked to a resident's door to look inside the resident's room.

On October 3, 2023 at 7:50 a.m., the Specialist wrote an Institutional Incident Report stating that he observed Grievant asleep.

CONCLUSIONS OF POLICY

¹ The Specialist had left the room and then returned with another employee.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “generally have a minor impact on agency business operations but still require intervention.”² Group II offenses include, “acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency’s services and operations.” Group III offenses include, “acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations.”

Group III offenses include offenses that “indicate significant neglect of duty.” An employee who is asleep in a security facility cannot perform duties essential to maintaining security. This constituted a significant neglect of duty.

The Agency has presented sufficient evidence to show that Grievant was sleeping during his work shift for several reasons. First, Grievant slouched in his chair. Second, Grievant rested his head against the wall. Third, Grievant’s head often tilted from one side to the other. Fourth, Grievant sometimes did not appear to be aware of or acknowledge the Specialist in the room. Fifth, Grievant remained seated in the chair motionless for several minutes. For example, Grievant was motionless slouched in the chair with his head against the wall from 7:28:56 a.m. until 7:34:05 a.m. Sixth, a Specialist wrote an Institutional Incident Report indicating that he observed Grievant sleeping. When these facts are considered together, they show Grievant was asleep during work hours.

Grievant denied being asleep or unalert while on post. The Agency has presented sufficient evidence to show that Grievant was asleep and unalert on post.

Grievant asserted that he had been drafted to work overtime contrary to policy. Grievant did not present the policy violated or establish the beginning and ending of his work hours on October 3, 2023.

Grievant argued that he should have been given a counseling memorandum rather than receive disciplinary action. Although the Agency could have issued Grievant a counseling memorandum instead of taking disciplinary action, the Agency had the discretion to take disciplinary action without having to first counsel Grievant. The Agency did not violate any policy by issuing disciplinary action without first counseling Grievant.

Grievant argued that the Specialist who reported him was acting based on an improper motive arising from prior conflict. If the Hearing Officer disregards the written statement of the Specialist, there remains sufficient evidence to support the issuance of disciplinary action.

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

² DHRM Policy 1.60, Attachment A.

....”³ 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.

Grievant argued that the Agency was unfair and inconsistent in disciplining employees. Grievant asserted that another employee was observed sleeping and given only a Group II Written Notice. Grievant claimed two other employees violated the Agency’s drug and alcohol policy but were disciplined differently from Grievant. Grievant asserted three employees got into a verbal and physical altercation but one of the employees was not disciplined at all. Grievant claimed the Agency’s disciplinary action was sometimes based on race. Grievant did not present sufficient evidence to support these allegations. For example, Grievant did not present testimony from those other employees or written notices regarding those disciplinary actions. The Hearing Officer cannot conclude that the Agency singled-out Grievant for disciplinary action or acted based on an improper motive.

In light of the standard set forth in the Rules, 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 is **upheld**.

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

³ Va. Code § 2.2-3005.

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.