



# COMMONWEALTH OF VIRGINIA

*Department Of Human Resource Management*

*Office of Employment Dispute Resolution*

## DECISION OF HEARING OFFICER

In re:

**Case number: 12028**

**Hearing Date: December 19, 2023**

**Decision Issued: January 29, 2024**

### PROCEDURAL HISTORY

On September 20, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for sleeping during working hours while assigned to a security post at a hospital.<sup>1</sup>

On October 18, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 30, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On December 19, 2023, a hearing was held at the Facility.

### APPEARANCES

Grievant  
Agency's Advocate  
Agency Party Designee  
Witnesses

### ISSUES

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<sup>1</sup> Agency Ex. at 1. During the hearing it was noted that the Written Notice form included a typographical error in Section I of the form where it lists the "Offense Date(s):" as "08/22/2022" however, the narrative in Section II of the form identifies the correct date of the offense, "8/22/2023." The "Administration of Employee Discipline: Due Process Notification also identifies the date of the offense as August 22, 2023, in Section IV of the form as does the Correctional Officer Procedural Guarantee Investigation Notice. See Agency Ex. at 004 and 016.

1. Whether Grievant engaged in the behavior described in the Group III 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:

Prior to his removal, Grievant was a Sergeant at a Department of Corrections Facility. Grievant was employed with the Agency for more than four years. Grievant's performance evaluations from 2020, 2021 and 2022 indicate Grievant's work was considered satisfactory and met, or exceeded, the Agency's expectations.<sup>2</sup> No evidence of prior active disciplinary action was introduced during the hearing.

On August 22, 2023, Grievant was assigned to a security post on a Unit at the Hospital. Grievant was on post in the Hospital Room and responsible for monitoring an inmate-patient receiving treatment at the Hospital.

Hospital Secretary worked on the Hospital Unit. Hospital Secretary was observing monitors which showed images from cameras positioned in the rooms on the Unit, when she observed what appeared to be a male correctional officer sleeping while in a seated position in a chair near the door of the Hospital Room on the Unit. The male correctional officer observed by Hospital Secretary was Grievant.<sup>3</sup>

Hospital Secretary observed that Grievant was in a seated position in a chair near the door with his head tilted back on his shoulder and his eyes closed. Hospital Secretary

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<sup>2</sup> Agency Ex. at 029-032, 042-044, 053-056.

<sup>3</sup> Agency Ex. at 008-011 and 012.

believed that Grievant was sleeping. Hospital Secretary asked other Hospital Unit staff to view the monitor and those staff told Hospital Secretary that they believed that the image on the monitor showed Grievant to be asleep.<sup>4</sup>

Hospital Secretary contacted Hospital Security Officer who also viewed the image on the monitor. Hospital Security Officer asked Hospital Secretary to enlarge the image of Grievant. Hospital Secretary enlarged the image of Grievant. Hospital Security Officer also observed that Grievant appeared to be asleep in the Hospital Room.<sup>5</sup> Hospital Security Officer walked to the Hospital Room.

When Hospital Security Officer entered the Hospital Room, Hospital Secretary observed on the monitor that Grievant appeared to awaken.<sup>6</sup>

Approximately 10 minutes elapsed between the time that Hospital Secretary first observed what she believed to be Grievant sleeping until Hospital Security Officer entered the Hospital Room.<sup>7</sup>

### **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." 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."<sup>8</sup>

#### **Whether the Grievant engaged in the behavior and whether the behavior constituted misconduct**

Grievant argued that he did not admit to sleeping and that the evidence was not sufficient to prove that he was asleep. To support his argument, Grievant pointed to the absence of a statement from the correctional officer working with Grievant to monitor the inmate-patient at the Hospital. During cross-examination, the Major testified that the correctional officer who was working with Grievant at the Hospital had indicated that she did not see Grievant sleeping.<sup>9</sup>

Hospital Secretary, however, credibly testified that she observed Grievant sleeping on the Hospital Unit video monitor and that she asked others to view the monitor to see if they too believed Grievant was asleep.<sup>10</sup> Hospital Secretary also credibly testified that when Hospital Security Officer entered the room where Grievant was sleeping, Grievant

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<sup>4</sup> Hearing Recording at 9:18-10:48; Agency Ex. at 010.

<sup>5</sup> Agency Ex. at 009.

<sup>6</sup> Hearing recording at 18:18-19:11; Agency Ex. 009 and 010.

<sup>7</sup> Agency Ex. at 010.

<sup>8</sup> See Virginia Department of Corrections Operating Procedure 135.1.

<sup>9</sup> Hearing Recording at 41:40-42:22. The correctional officer who was working with Grievant at the Hospital on August 22, 2023, was not called to testify by either party.

<sup>10</sup> Hearing Recording at 9:18-10:48; Agency Ex. at 010.

“jumped” and appeared to awaken as though he had been startled from sleep.<sup>11</sup> Based on information provided by Hospital Secretary during the Agency’s investigation of the matter, approximately 10 minutes passed from the time that Hospital Secretary first observed what she believed to be Grievant sleeping until Hospital Security Officer entered the room and Grievant appeared to awaken.<sup>12</sup>

The Major investigated the allegation of Grievant sleeping while on post at the Hospital. In addition to a written statement from Hospital Secretary, the Major also received written statements from Hospital Security Officer and Grievant. The Major also received an email from the Hospital’s Security Manager who noted that he did not witness Grievant sleeping but stated that when he spoke with Grievant, Grievant “did admit . . . that he nodded off/sleeping.”<sup>13</sup> The Major credibly testified that when the Major spoke with Grievant about the incident, Grievant was “visibly upset” and “disappointed” in himself.

In the written statement that Grievant provided to the Major about the incident, Grievant wrote that he took medicine prescribed to him by his doctor around 9:00 pm on the night before the incident. Grievant wrote that the medicine “helps [him] sleep, but also makes [him] drowsy.”<sup>14</sup> Grievant noted that “he did not argue with [the Hospital’s Security Manager] when the Hospital’s Security Manager informed Grievant that he had been observed sleeping.”<sup>15</sup>

Hospital Secretary credibly testified that she observed Grievant sleeping. Based on Hospital Secretary’s observations, Grievant was asleep for the approximately 10 minutes it took Hospital Secretary to observe Grievant on the monitor, ask other staff near her to confirm what she was seeing, call Hospital Security Officer, view the monitor with Hospital Security Officer and observe Hospital Security Officer enter the Hospital Room. The Agency has met its burden of proving by a preponderance of the evidence that Grievant was asleep while he was on duty working at the Hospital.

#### Whether the Agency’s discipline was consistent with law and policy

Sleeping during working hours is a Group III offense.<sup>16</sup> Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.<sup>17</sup>

Grievant was expected to report for duty in the mental and physical condition to perform the duties of his post.<sup>18</sup> The post that Grievant was working on August 22, 2023, required that he maintain constant sight supervision of the inmate-patient.<sup>19</sup>

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<sup>11</sup> Hearing recording at 18:18-19:11; Agency Ex. 009 and 010.

<sup>12</sup> Agency Ex. at 010.

<sup>13</sup> Agency Ex. at 008.

<sup>14</sup> Agency Ex. at 011.

<sup>15</sup> Agency Ex. at 011.

<sup>16</sup> See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.8.

<sup>17</sup> See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.A.

<sup>18</sup> Agency Ex. at 090.

<sup>19</sup> Agency Ex. at 95, see also Hearing Recording at 30:55-31:27.

Agency witnesses testified that when security personnel fall asleep and are not alert or aware of their surroundings while on post, it presents the opportunity for an inmate to escape and puts the public at risk. This is especially true in an otherwise unsecured setting, like the Hospital, where the only security measures are the correctional officers monitoring the inmate-patients.<sup>20</sup>

Agency witnesses also testified that the Agency had experienced an incident at the Hospital in early August when an inmate escaped from the Hospital while officers were sleeping on post. As a result, the Facility had been spending time during morning formations discussing that situation and reminding security personnel of the importance of remaining vigilant at all times and the significant risk of failing to do so.<sup>21</sup>

Grievant noted in the information he provided to the Agency and on the Grievance Form A that he was on medication to treat anxiety and that the medication may cause drowsiness. There is not enough information in the record to determine whether Grievant's anxiety would qualify as a disability under the Americans with Disabilities Act that would require reasonable accommodation by the Agency. Even assuming Grievant were to demonstrate that he has a disability under the Americans with Disabilities Act, it is unlikely that a reasonable accommodation would be for the Agency to allow Grievant to sleep while on a security post that required the constant sight supervision of the inmate-patient. The Americans with Disabilities Act requires employers to provide reasonable accommodations for an employee's disability, but it does not broadly shield employees from disciplinary action for their own misconduct.

The Agency has met its burden of proving that the discipline it issued to Grievant was consistent with law and policy.

### Mitigation

Grievant argued that the disciplinary action taken against him was unfair and that the Agency did not appropriately consider his performance record.

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

In this case, the Agency considered Grievant's history of good performance evaluations. Because of the serious nature of the offense and the significant risk posed by security personnel sleeping while on duty monitoring an inmate-patient at a hospital, however, the Agency determined that the issuance of a Group III written notice with termination was appropriate in this case.<sup>22</sup>

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<sup>20</sup> Hearing recording at 27:23-28:50, 53:21-1:01:42.

<sup>21</sup> Hearing recording at 48:21-51:02.

<sup>22</sup> Hearing recording at 1:06:11-1:08:07.

Virginia 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>23</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.

Grievant argued that the disciplinary action taken against him was too harsh and that the Hearing Officer should consider information of disciplinary action related to a correctional officer that Grievant alleged was found sleeping while on a security post at a hospital. The Hearing Officer does not find such information to be relevant to this case because a correctional officer is not similarly situated to a sergeant like Grievant.

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 Grievant of a Group III Written Notice of disciplinary action with termination 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 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.

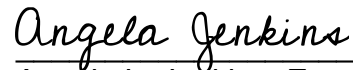
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<sup>23</sup> Va. Code § 2.2-3005.

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>24</sup>

  
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Angela L. Jenkins, Esq.  
Hearing Officer

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<sup>24</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.