COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 12040

Hearing Date: January 30, 2024
Decision Issued: February 1, 2024

PROCEDURAL HISTORY

On July 5, 2023, Grievant was issued a Group III Written Notice of disciplinary action, without job suspension or termination. The offense was sleeping during work hours, occurring on June 13, 2023.

The Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 20, 2023, the Office of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On January 30, 2024, as previously scheduled, a hearing was held by remote video.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively, by numbered tab. The hearing officer has carefully considered all evidence and argument presented.

APPEARANCES

Grievant
Agency Representative
Counsel for Agency
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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. *In this grievance, the burden of proof is on the Agency. Grievance Procedure Manual* (GPM) § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged situation, if otherwise properly before the hearing officer, justifies relief. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (*quoting Rules for Conducting Grievance Hearings*, VI(B)), 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, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

DHRM Policy 1.60, *Standards of Conduct*, requires employees (among other things) to:

- Perform assigned duties and responsibilities with the highest degree of public trust.
- Devote full effort to job responsibilities during work hours.
- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.

Agency Exh. 10.

Agency Operating Procedure 135.1, *Standards of Conduct*, echoes the personal conduct expectations of DHRM Policy 1.60. Agency Exh. 14. Under this policy, the agency supports the use of progressive discipline applied fairly and consistently to address employee behavior, conduct, or performance incompatible with the *Standards of Conduct*, performance expectations, and procedures and training. Sec. III.A. Depending on the severity of the situation, corrective or disciplinary action may be accomplished through informal or formal means. Sec. III.C. The more severe formal discipline divides unacceptable behavior into three groups, according to the severity of the behavior, with *Group I* being the least severe and *Group III* being the most severe. Sec. X.E. Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. Group III offenses specifically include sleeping during working hours. Sec. XIV.B.8.

Agency Operating Procedure 135.2, *Rules of Conduct Governing Employees Relationships with Offenders*, expects vigilance and states that employees are expected to be alert to detect and prevent escapes from custody or supervision, or violations of DOC operating procedures. Agency Exh. 11, Sec. II.C.

The Offense

The Group III Written Notice, issued by the warden on July 5, 2023, detailed the facts of the offense, and concluded:

> On 6/13/23 at approximately 3:30 AM, Captain [L] observed [Grievant] asleep on duty in the Watch Commander's office. He was sitting in a chair with his head down, with his chin on his chest. He did not make any movements nor did he acknowledge that Captain [L] was standing in the doorway. This constitutes a Group III violation of the Standards of Conduct.

As circumstances considered, the Written Notice stated the Grievant "has an otherwise favorable work record, with no disciplinary actions throughout his employment." The Agency stipulated that the Grievant is and has been a valued employee.

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as lieutenant, a supervisory role that often puts the Grievant as the highest-ranking staff on site, without other active disciplinary actions.

The assistant warden testified that he instituted the disciplinary due process with the Grievant, and he first learned from the Grievant during this process that he was diabetic. The assistant warden testified that the Grievant is often the highest-ranking staff member during the night shift. The assistant warden testified consistently with the Written Notice, and he has input on the level of discipline but the decision is left to the warden.

Captain L. testified consistently with his written statement:

> On June 13, 2023, at approximately 0330 hours I [ ] was entering the shift commander's office. I observed [the Grievant] with his head down with his chin on his chest. He was not making any movements, nor did he acknowledge that I was standing in the doorway. I stepped away from the office door towards the shredder in the hallway. I put some papers on top of the shredder and went back to check on him. Before I could say something to him, someone said something on the radio and [the Grievant] announced count time.

Agency Exh. 8. Captain L. testified that the Grievant's desk was facing the doorway, so the Grievant's view was in the direction of the doorway. He testified that while he could not see the Grievant's eyes, he observed the Grievant motionless as described for 15-20 seconds. An officer reported to Captain L. later in the shift that he observed the Grievant asleep. While Captain L. was the watch commander, the Grievant was the shift commander on duty. Captain L. learned for the first time during this disciplinary process that the Grievant is diabetic.

The warden issued the Group III Written Notice, and he testified consistently with the Written Notice. He recognized that the Grievant is often the highest-ranking officer on duty, and that the Grievant was a valued employee with a good work record. He testified that the Group III discipline was appropriate, but it was mitigated down to include no other adverse employment action such as job termination, demotion, or suspension. On cross-examination, the warden stated that he was aware of no other observation of the Grievant sleeping on duty. The other report of the Grievant sleeping had no bearing on the warden's disciplinary decision. The warden also confirmed that he elected to issue a warning to a non-supervisory corrections officer for sleeping on duty a month or so before the Grievant's offense.

The Agency called the Grievant to testify, and the Grievant testified that he was not sleeping on duty; that it was normal for Captain L. to walk by his office; and that he did not acknowledge Captain L.'s presence in the doorway because he was busy with something else.

The Grievant testified that his diabetic condition was not relevant because he was not asleep as charged. The Grievant believed his superiors knew he was diabetic, so the captain's witnessing a moment of unconsciousness as described should have triggered an emergency response. At the conclusion of his testimony, the Agency rested. The Grievant elected not to testify further for his case and called no other witnesses.

Through his grievance filings, the Grievant mentioned his diabetic condition:

> Under the ADA (Americans with Disabilities Act), Diabetes is a disability. A disability is defined as a physical or mental impairment that substantially limits one or more major life activities. Major life activities include but are not limited to actions like eating, SLEEPING, speaking, and breathing. When someone has a diabetic "low", they can lose consciousness, become disoriented, etc.

Agency Exh. 6, p. 47. The Grievant, however, insists that being diabetic or any disability therefrom is not applicable to the grievance because he was not asleep as charged.

Analysis

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI (*Rules*); *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. DHRM Policy 1.60. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

EDR's *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 agency management that are found to be consistent with law and policy." *Rules* § VI(A).

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior.

EDR's *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

(i) the employee engaged in the behavior described in the Written Notice,

(ii) the behavior constituted misconduct, and
(iii) the agency's discipline was consistent with law and policy,

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Rules § VI(B).

In sum, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Based on the testimony, manner, tone, and demeanor of the testifying witnesses, I find that the Agency has reasonably proved the misconduct, and the offense of sleeping while on duty is squarely within the Group III level.

By a preponderance of the evidence, the Agency has proved the conduct described in the Written Notice and that it was misconduct. The Grievant is in a position of authority who should be modeling conduct, so the instance of the disciplinary warning to a corrections officer may not be deemed disparate conduct because the corrections officer is not a similarly situated employee.

The preponderance of the evidence establishes the essential facts of the offense. The offense falls squarely within the scope of a Group III Written Notice. Accordingly, I find that the Agency has met its burden of showing the Grievant's misconduct as charged in the Written Notice. Therefore, unless otherwise mitigated, I find that the Group III discipline is consistent with policy.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [DHRM]." 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.

A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. The only evidence of disparate treatment involves an employee who was not similarly situated. There is no evidence of any improper motive by the Agency, such as retaliation. Any potential disability implication is disavowed by the Grievant. Given the nature of the Written Notice and circumstances, as decided above, and the Agency's mitigation of the discipline to exclude termination, demotion, or suspension, I lack authority to apply any further mitigation.

DECISION

For the reasons stated herein, the Agency's Group III Written Notice is consistent with policy and is, accordingly, 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
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.

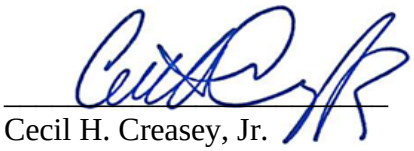
A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to 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]

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

[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].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer