



**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

**DECISION OF HEARING OFFICER**

In re:

**Case number: 12011**

**Hearing Date: November 14, 2023**  
**Decision Issued: December 21, 2023**

**PROCEDURAL HISTORY**

On August 29, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for sleeping on post.

On August 30, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 18, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On November 14, 2023, a hearing was held at the Facility.

**APPEARANCES**

Grievant  
Grievant's Advocate  
Agency's Advocate  
Agency Party Designee  
Agency Observer (agreed to by the parties)  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Group III Written Notice?
2. Whether the behavior constituted misconduct?

*An Equal Opportunity Employer*

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 Corrections Officer at a Department of Corrections Facility. Grievant was employed with the Agency for more than four years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 27, 2023, at approximately 4:35 am, Grievant relieved another officer from post as roving patrol.<sup>1</sup>

As roving patrol, Grievant's duties included operating an Agency vehicle to patrol and observe activities on the Facility's grounds. Grievant's duties also included monitoring and responding to activities along the perimeter fencing. As roving patrol, Grievant was expected to serve as a line of defense to prevent escape from, or infiltration into, the Facility.<sup>2</sup>

The Agency vehicle Grievant used was equipped with weapons and ammunition.<sup>3</sup>

At approximately 5:35 am, Security Chief came onto the grounds in her personal vehicle and drove around the perimeter of the Facility grounds. Security Chief observed a roving patrol Agency vehicle parked behind the ballfield. Security Chief approached the vehicle and parked her vehicle next to the Agency vehicle.<sup>4</sup>

Security Chief observed Grievant asleep in the Agency vehicle and that the Agency vehicle was parked with the engine running.

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

<sup>2</sup> Hearing recording at 23:27-24:03, 51:32-52:59.

<sup>3</sup> Hearing recording at 23:27-23:36.

<sup>4</sup> Agency Ex. at 13, Hearing Recording at 1:22:15-1:26:17.

Security Chief observed Grievant for some period of time during which she took a photograph of Grievant while he slept and then called the shift commander to advise him to send an officer out to relieve Grievant from his post. Grievant awoke after Security Chief concluded her call with the shift commander. Security Chief asked Grievant if he was okay and he replied that he was “dead tired.”<sup>5</sup>

The photograph of Grievant taken by Security Chief showed the left side of Grievant’s face. Grievant’s head was slightly tilted back, Grievant’s mouth was open, and his eye was closed. Grievant was asleep in the photograph.<sup>6</sup>

Later that morning, Grievant sent an email to Security Chief and others with the subject line “Roving Incident Report.” In the email Grievant admitted that he had “dozed off” and that he “should have radioed [Captain] to be taken off of roving but [he] didn’t want to be an inconvenience to the shift knowing that we were short officers during this night.”<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

Agency employees are “expected to be alert to detect and prevent escapes from custody or supervision, or violations of [Agency] operating procedures.”<sup>9</sup> The post that Grievant was working on July 27, 2023, required that he continuously drive around the facility grounds in an Agency vehicle and maintain constant surveillance of the area of control for the post, including observing when persons or vehicles were entering or exiting the facility or moving about the Facility’s grounds. Grievant was required to notify the shift commander or his supervisor to request relief if he was feeling fatigued or incapable of remaining alert.<sup>10</sup>

On July 27, 2023, Grievant was at work and supposed to be alert and working on his post as roving patrol. Grievant pulled the Agency vehicle off the road, put the vehicle’s engine into “park” and fell asleep. Grievant remained asleep while Security Chief drove her vehicle toward Grievant in the Agency vehicle. Grievant continued to sleep while

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<sup>5</sup> Agency Ex. at 13, Hearing Recording at 1:25:36-1:25:44.

<sup>6</sup> Agency Ex. at 11.

<sup>7</sup> Agency Ex. at 12.

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

<sup>9</sup> Virginia Department of Corrections Operating Procedure 135.2, Procedure II.C.

<sup>10</sup> Hearing Recording at 28:57-31:43, 1:26:17-1:30:14.

Security Chief parked her personal vehicle next to Grievant in the Agency vehicle. Grievant continued to sleep while Security Chief took a photograph of Grievant and called the shift commander to send an officer to relieve Grievant from his post.

Grievant admits that he was asleep while he was supposed to be working on post on July 27, 2023. Grievant was not alert and able to detect or prevent escape while he was asleep on post. Grievant could not perform the duties of his post while he was asleep.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct.

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

Sleeping during working hours is a Group III offense.<sup>11</sup> Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.<sup>12</sup>

The roving patrol is supposed to continue moving around the facility grounds unless there is a specific work-related reason to stop the vehicle. On July 27, 2023, while Grievant was on roving patrol, he stopped the Agency vehicle, put the vehicle's engine into "park" and went to sleep. Grievant did not testify and offered no explanation as to why he stopped the vehicle. The only explanation from Grievant was his answer to Security Chief, after she found him sleeping, when Grievant told her that he was "dead tired." Grievant knew that if he was feeling fatigued or incapable of remaining alert that he should contact the watch commander or his supervisor to ask for someone to relieve him from post,<sup>13</sup> as the post order<sup>14</sup> directs, rather than pulling over, putting the vehicle's engine into "park", and sleeping.

Agency witnesses credibly testified that the roving patrol is the last line of defense to escape.<sup>15</sup> While Grievant slept he could have missed the Facility's last opportunity to prevent an inmate escape. While Grievant slept, he was in a compromised position. Grievant's compromised position made him more susceptible to being surprised and overtaken by an escaping inmate or any other person intending harm, who would then have access to firearms, ammunition, keys to the perimeter of the Facility and a vehicle.

Grievant appeared to argue that the Agency inappropriately considered the Notice of Improvement Needed/Substandard Performance issued to Grievant on July 25, 2023, for failing to complete a perimeter fence check.<sup>16</sup> The Agency identified the Notice of Improvement Needed among the consideration of mitigating and aggravating circumstances. The Agency also considered the Grievant's years of service and prior performance evaluations.<sup>17</sup> This Hearing Officer finds that, even in the absence of the

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<sup>11</sup> See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.7.

<sup>12</sup> See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.A.

<sup>13</sup> See Agency Ex. at 12.

<sup>14</sup> Agency Ex. at Tab 16 (provided in camera), Hearing recording at 28:57-31:43, 1:26:17-1:30:14.

<sup>15</sup> Hearing Recording at 23:00-24:03, 1:13:40-1:14:17, 1:28:50-1:30:14.

<sup>16</sup> Agency Ex. at 14.

<sup>17</sup> Hearing Recording at 35:58-39:43.

Notice of Improvement Needed, the Agency's disciplinary action was warranted and reasonable.

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

### Mitigation

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>18</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 other officers, Officer O, Officer N and Officer P, slept while on duty but were not removed from employment at the Facility.

The only testimony related to the incident involving Officer O was from Security Chief who testified that she had Officer O removed from his post because he was not as alert as she would have liked. When questioned about the details of the incident, Security Chief testified that Officer O's shift commander at the time investigated the incident and determined that Officer O was not asleep.<sup>19</sup> It was unclear when the incident involving Officer O occurred. This Hearing Officer finds that the Grievant and Officer O were not similarly situated because the Agency determined that Officer O was not sleeping.

With respect to Officer N, Captain and Lieutenant both testified that they had "heard" that Officer N had fallen asleep on post. Captain and Lieutenant also both testified that they knew that Officer N was no longer employed with the Agency but did not have details of the circumstances of her separation from the Agency. Captain testified that he believed that Officer N had been issued a Notice of Improvement Needed and a written notice at the same time, but that the process was conducted by "the administration," so he was unable to provide more details.<sup>20</sup> Lieutenant testified that he had no first-hand information or details about the situation involving Officer N because the individuals involved in that case did not report to Lieutenant. Human Resources Officer testified that Officer N resigned while she was still going through due process for the alleged offense

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<sup>18</sup> Va. Code § 2.2-3005.

<sup>19</sup> Hearing recording at 1:30:18-1:32:33.

<sup>20</sup> Hearing recording at 1:46:47-1:50:44.

and before the point in the process when the Agency would have issued a written notice of disciplinary action.<sup>21</sup> Officer N resigned before the Agency had the opportunity to issue a written notice for any alleged offense of sleeping on post, the information in the record relating to Officer N does not support any assertions that the Agency did not consistently apply discipline among similarly situated employees.

Captain testified that he issued a Notice of Improvement Needed to Officer P after it was reported to him that Officer P had caused damage to an Agency vehicle because she veered off the road when she momentarily nodded off while driving the vehicle on roving patrol. Captain testified that he did not consider Officer P's offense to be "sleeping" on post because it was inadvertent and unintentional. Indeed, multiple Agency witnesses testified regarding their concern with the intentional or purposeful nature of Grievant's misconduct, that is, that he intentionally stopped the Agency vehicle while on roving patrol, intentionally put the vehicle's engine into "park", and then slept.<sup>22</sup> Grievant asserts that the Standards of Conduct do not distinguish between "intentionally" sleeping and momentarily falling asleep or nodding off, such that an officer who momentarily nods off should be disciplined in the same manner as an officer who intentionally puts himself in a position to sleep. While the Standards of Conduct do not appear to define "sleeping" or clarify a distinction between momentarily nodding off and "intentionally" sleeping, that is precisely the kind of distinction that the Agency may consider in determining appropriate discipline and whether to mitigate a particular disciplinary action or not. This Hearing Officer finds that Grievant and Officer P were not similarly situated because their misconduct was not similar. Officer P inadvertently and momentarily nodded off; she did not purposefully put herself in a position to sleep and then sleep for a sufficient period of time to have someone approach her in another vehicle, park beside her, take her photograph and make a call.

Grievant also argued that the Hearing Officer should consider information of disciplinary actions related to probationary employees alleged to have been found sleeping on post. The Hearing Officer does not find such information to be relevant to this case. This Hearing Officer does not consider a probationary employee who is within their introductory period of their position when they are still learning the job to be similarly situated to a non-probationary employee like Grievant.

Grievant's evidence was not sufficient to show that the Agency singled-out Grievant for disciplinary action. 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**.

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<sup>21</sup> Hearing recording at 2:08:46-2:11:37.

<sup>22</sup> Hearing recording at 57:30-59:01, 1:02:28-1:02:59, 1:53:10-1:56:30, 2:02:48-2:05:39.

## 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 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>23</sup>

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Angela L. Jenkins, Esq.  
Hearing Officer

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<sup>23</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.