



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12134

Hearing Date: July 15, 2024

Decision Issued: July 23, 2024

PROCEDURAL HISTORY

On April 8, 2024, 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.¹

On May 7, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On May 20, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On July 15, 2024, a hearing was held at the Facility. The Grievant did not appear for the hearing. Prior to commencing the hearing, the Hearing Officer called the telephone number she had for Grievant and received no answer. The hearing proceeded as scheduled without Grievant's participation.

APPEARANCES

Agency's Advocate
Agency Party Designee
Witnesses

¹ Agency Ex. at 1-3.

ISSUES

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

On November 16, 2023, Grievant was assigned to a security post in a Room at the Hospital. Grievant and a male corrections officer were on post in the Room and responsible for monitoring an inmate-patient receiving treatment at the Hospital.

A Hospital security officer observed two corrections officers sleeping on post in the Room on November 16, 2023. The Hospital security officer reported the incident by email to the Facility's Chief of Security and then also spoke with the Chief of Security by telephone to describe her observations.² The Hospital security officer reported that when she was making her rounds, she checked the room and observed that "the female officer was asleep ... [w]hen [the Hospital security officer] went back to check on the [inmate-patient] again at 5:38 am [b]oth officers was asleep. . . ."³ The Chief of Security checked

² Hearing Recording at 11:25-14:26.

³ Agency Ex. at 4-5.

Facility records and determined that Grievant was the female corrections officer observed by the Hospital security officer.⁴

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."⁵

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

Grievant did not participate in the hearing and did not offer any evidence. Based on the information Grievant included on the Grievance Form A, it appeared that Grievant may have generally denied that she was asleep while on duty on November 16, 2023.⁶

Based on the evidence presented, this Hearing Officer finds credible the written report of the incident that the Facility received from the Hospital security officer which was consistent with the information the Hospital security officer reported to the Chief of Security during their phone conversation. The Chief of Security credibly testified that he had worked with the Hospital security officer over a period of time and information she had provided in the past had been verifiable and proven accurate. The Chief of Security also credibly testified that he investigated the matter and determined that Grievant was the female corrections officer that the Hospital security officer observed sleeping on post on November 16, 2023.⁷

The Agency has met its burden of proving by a preponderance of the evidence that Grievant was asleep while she 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.⁸ Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.⁹

Grievant was expected to report for duty in the mental and physical condition to perform the duties of her post. The post that Grievant was working on November 16,

⁴ Agency Ex. at 5, see also Hearing Recording at 15:22-15:44, 19:50-21:47.

⁵ See Virginia Department of Corrections Operating Procedure 135.1.

⁶ Agency Ex. at 15.

⁷ See Hearing Recording at 11:25-14:26, 19:50-21:47.

⁸ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.8.

⁹ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.A.

2023, required that she maintain constant sight supervision of the inmate-patient.¹⁰ If Grievant was unable to perform her duties because she had insufficient rest or was feeling sleepy, she was expected to notify the Facility so that relief could be provided without compromising security.¹¹

The Warden 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.¹²

The Warden also testified that prior to the incident involving Grievant, the Agency had experienced an incident at another hospital in the Fall of 2023. During that incident, an inmate escaped from a hospital while officers were sleeping on post. As a result, the Facility had spent time during pre-shift formations (or muster) discussing that situation and reminding security personnel, including corrections officers like Grievant, of the importance of remaining vigilant at all times.¹³

Based on the information Grievant included on the Grievance Form A, it appeared that Grievant may have argued that she was not provided with sufficient due process because the Group III Written Notice was issued while Grievant was on leave.¹⁴ During the hearing, the Warden testified that Grievant had been provided with notice of the Agency's investigation of her alleged sleeping on duty pursuant to the Correctional Officer Procedural Guarantee Act, but that the Written Notice had been issued while Grievant was on leave.¹⁵ To the extent Grievant would have argued that the Agency did not afford her with sufficient due process, the hearing process cures any such deficiency. Although Grievant did not appear for the hearing, Grievant participated in a pre-hearing conference call to set the date and time of the hearing, had the opportunity to appear at the hearing, and, had she chosen to appear, would have been able to present any evidence and arguments she wished at that time.

The Agency's discipline 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...."¹⁶ 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

¹⁰ Hearing Recording at 8:45-10:41, 27:47-28:33; see also Agency Ex. at 54-61.

¹¹ Hearing Recording at 21:57-23:35, 27:47-31:11.

¹² Hearing Recording at 27:47-28:33, see also 10:41-11:25.

¹³ Hearing recording at 34:04-35:55, 39:25-40:55.

¹⁴ Agency Ex. at 15.

¹⁵ Hearing recording at 31:52-33:40; see also Agency Ex. at 14.

¹⁶ Va. Code § 2.2-3005.

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. In light of this standard, 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 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.¹⁷

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

¹⁷ 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.