

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF EMPLOYEE DISPUTE RESOLUTION**  
**DIVISION OF HEARINGS**

**In the matter of Case No.: 12263**  
**Hearing Date: 13 May 2025**  
**Decision Issued: 28 May 2025**

**PROCEDURAL HISTORY**

On 5 March 2025, Grievant was issued a Group III Written Notice of disciplinary action with termination. In the written notice, the Agency described the nature of the offense as “[Written Offense Code] 71-Sleeping During Work Hrs.” Grievant was terminated effective 5 March 2025.

On 5 March 2025, Grievant properly and timely filed a Grievance Form A to challenge the Agency’s action. On 31 March 2025, the Office of Employment Dispute Resolution assigned this matter to this Hearing Officer.

On 2 April 2025, the parties participated in a pre-hearing conference call scheduled by the hearing officer. The parties agreed to communication by email alone. During the pre-hearing conference, the parties agreed to the hearing date of 13 May 2025. Thereafter, on 7 April 2025, the Hearing Officer issued his Pre-Hearing Report and Order.

On 13 May 2025, the hearing was held in-person at the Agency’s facility. The Agency and the Grievant each submitted documents for exhibits that were accepted into the grievance record. The record closed at the conclusion of the hearing. 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 Group III Written Notice of disciplinary action (i.e., Sleeping during working hours)?
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 Grievant 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.

The Grievant requested an administrative due process hearing to challenge termination of his employment at a facility (the "Facility") of the Department of Corrections (the "Department", "DBHDS" or the "Agency"), effective 5 March 2025, pursuant to a Group III Written Notice issued by Management of the Agency, as described in the Grievance Form A submitted by Grievant dated 5 March 2025.

### **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 dismissal, Grievant was a Corrections Officer at a Facility of the Department of Corrections ("Agency"). Grievant had worked at the Agency since February 2021 and had worked at the current facility for approximately two years. Prior to his termination, Grievant's work performance was satisfactory with no reported disciplinary infractions.

#### **The Offense**

On 19 February 2025, Grievant was informed that he would be transported to the Medical College of Virginia ("MCV") Security Unit to provide security for an inmate who was receiving treatment at MCV. Grievant did not know the condition of the inmate for whom he was providing security. Grievant did not inform anyone superior to him in his chain of command that he would have difficulty providing security for an inmate who appeared comatose.

At approximately 1119, a DOC Captain, while on duty conducting roving patrols at the MCV Hospital entered the room in which Grievant was assigned to provide security and observed what appeared to her to be Grievant sleeping while at his security post. A picture taken by the Captain and included as evidence showed Grievant to be slumped down with his service cap pulled down with his service cap covering his eyes.

The Captain reported that when she observed Grievant apparently sleeping her first action was to engage the other Corrections Officer present at the post in conversation to confirm that she was awake and acting in accordance with her responsibilities. The Captain explained that her reason for engaging the other officer was to ensure that she was unharmed and that the inmate for whom they were assigned as security was also okay.

The Captain reported that the Grievant did not stir while she was engaging in conversation with the other officer present at the scene. She further stated that Grievant initially failed to respond when she initially spoke directly to him. The Captain stated that after addressing Grievant several times, Grievant finally did answer her. She asked him if he was okay and whether he needed to be relieved. Grievant stated that he was okay and denied the need for relief. Thereafter, the Captain reported the incident to the Assistant Warden of the Facility.

The Captain explained that the purpose of the roving patrol is not to “catch someone sleeping,” but to provide added security to ensure that corrections officers and the patients for whom they are providing security are safe. She further explained that when she observes an officer who appears to be sleeping, her first concern is to ensure that there had not been a further breach of security since sleeping could present a danger to the officer’s partner, the inmate and to the public at large.

The Captain stated that even if a patient is immobile (e.g., unconscious, comatose or otherwise bedridden), an officer who is not awake and alert creates a potential danger to the inmate, himself, his partner, and the public at large. She noted that the officers are present to protect the inmate as well as to protect the public from the inmate. She noted as an example that if victims or associated individuals victimized by the inmate learned that he was in the hospital they could cause him harm.

A DOC Major who was assigned to the same facility as Grievant testified that he had seen the images of Grievant with his service cap over his eyes and stated that it appeared to him that Grievant was asleep on post. The Major further stated that such behavior was inconsistent with the responsibilities of a corrections officer who was assigned to a Transportation Security Post.

The Major and the Warden of the Facility both noted that the inmate would have been permitted to have visitors while at VCU. They noted that the presence of visitors could allow for an escape or some other unforeseen situation. Correction officers were therefore required to be alert at all times.

The Major and the Warden each testified that there was zero tolerance for sleeping on watch. The Major and the Warden each further testified that they were not aware of any occasion on which a corrections officer who was found to be sleeping on watch was not terminated.

The Warden acknowledged that he had initially recommended a Group III violation with a 40-hour suspension when it was not clear to him that Grievant had actually been sleeping. He

noted that Grievant initially stated that he was just dealing with some anxiety and that his head was down. He further stated that when he concluded that Grievant was, in fact, sleeping, he recommended termination. The Warden further noted that he considered Grievant's statement during the course of the investigation that "I screwed up. I let you down. I let the Major down. I have to accept whatever you decide," constituted an admission of sleeping. See Agency Exhibit 6, Bates No. 012

The Hearing Officer found that the Agency witnesses testified consistently and credibly about the charged conduct in the Written Notice. Testimony provided by the DOC Captain in addition to the images provided by the Agency as evidence confirmed the facts alleged in the Written Notice regarding the specifics of the incident.

### **Grievant's testimony**

Grievant denied that he was asleep. He stated that when he observed the inmate, in an apparent unconscious or comatose state in the bed triggered a post-traumatic stress response ("PTSD") to issues that he experienced over the death of his father. He stated that he does not know exactly what happened, but that the PTSD reaction caused him to "black out" and that he mentally "not be there" at the hospital.

Grievant testified that during the trip from the Facility to MCV, he mentioned to other officers in the vehicle that he hoped that he did not have to provide security for a terminal patient and further explained that he had experienced issues related to the death of his father. (Grievant's father had died approximately one year previous.) Grievant admitted that the other officers in the vehicle were not senior in rank to him and that he did not convey his concerns to his chain of command.

Grievant stated that he was taking anxiety medication at the time of the incident, but he did not recall the name of the medication. Grievant acknowledged that the medication did not make him sleepy or cause him to be unable to carry out his duties.

Grievant stated that he had been receiving counseling for his PTSD, but he did not present any evidence from a doctor or allied health professional that indicated that he was medically or psychologically unable to perform his duties.

### **Additional evidence**

Agency Exhibit 19 (Transportation Post Order) provides, in pertinent part, that the "Job Summary" of an officer assigned to transportation include:

**Provide custody and ensure the security of inmates being transported. Ensure the the safe expedient delivery and return to destinations of all inmates who need to be transported . . . . Corrections Officers assigned to any post must use good judgment and pay careful attention to the general and specific issues and details related to the post of assignment.**

Agency Ex. 19; Bates No. 017.

The exhibit further provided that duties include:

Prior to assuming any post, notify the Unit Manager, Unit Commander, Shift Commander or Chief of Security of any mental and/or physical condition that would prevent you from being alert and/or effectively proficiently perform all of the duties, responsibilities, and obligations associated with this post.

Id. Bates No. 019

The exhibit further provided that a Correction Officer:

Shall stay alert to possible security problems, such as escape attempts, etc., and take the necessary actions to prevent such breaches of security.

Id.

### **Analysis and Discussion**

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.

Evidence presented by the Agency included documentary evidence including photographic evidence of Grievant allegedly sleeping while on duty and the testimony of witnesses.

After considering the evidence, including Grievant's admissions, and the photographic evidence, confirms the facts of the offense, I find that the Agency has proved the misconduct charged in the Written Notice. In so finding I specifically note that Grievant's assertion that he was in some kind of "altered mental state" such that he was mentally "not present" does not present a functional difference from sleeping on duty. Accordingly, and for the reasons detailed above, I find that the instance of conduct charged in the Written Notice constitutes a significant security breach and, therefore, a Group III offense.

#### **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]." The Agency's Policy 135.1, *Standards of Conduct*, is consistent with DHRM policy. 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 consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

EDR has further explained:

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency noted in its documentary evidence that no mitigating evidence was found. Agency Exhibit 5; Bates No. 011.

Grievant asserted that his actions were not intentional and that his "altered mental state" stemmed from the recent death of his father and another loved one. Grievant acknowledged, however, that he did not report up the chain of command that he would have difficulty providing security for someone in an apparent comatose state. Grievant further testified that his period of time as employment as a Corrections Officer without any previous disciplinary actions should be considered as mitigating evidence and that a less severe sanction was warranted.

The Agency witnesses testified that there is zero tolerance for sleeping on duty. No evidence was presented that there has been deviance for this policy. Accordingly, I find that the mitigating factors offered by the Grievant do not rise to the level required to alter the Agency's election to exercise its discretionary discipline.

### **DECISION**

For the reasons stated herein, the Agency's Group III Written Notice, with Termination must be and 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](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>3</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].

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



Prescott L. Prince, Esq., (VSB# 23077)  
Hearing Officer  
1901 Huguenot Road, Ste. 200  
N. Chesterfield, VA 23235  
Telephone: (804) 677-3744  
Facsimile: (804) 674-9864  
Email: [plprince@aol.com](mailto:plprince@aol.com)