



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12172

Hearing Date: November 18, 2024

Decision Issued: January 10, 2025

PROCEDURAL HISTORY

On August 27, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for sleeping while assigned to a transportation security post at a hospital.¹

On September 5, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 23, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On November 18, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency's Legal Advocate
Agency Party Designee
Agency Observer²
Witnesses

¹ Agency Ex. at 1-2.

² The Agency requested that an Agency employee be allowed to observe the proceeding for training purposes. Because the Grievant did not object to an Agency employee observing the hearing, the Hearing Officer allowed the Agency employee to observe the proceeding for training purposes.

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 his removal, Grievant was a Corrections Officer at a Department of Corrections Facility. Grievant was employed with the Agency for more than four years. Based on testimony during the hearing, prior to the incident giving rise to this disciplinary action, Grievant's performance had been satisfactory to the Agency and Grievant had been recognized as an "employee of the month" in March 2024. No evidence of prior active disciplinary action was introduced during the hearing.³

Grievant and Officer X were assigned to a transportation security post in a Room at the Hospital. Grievant and Officer X were responsible for monitoring an inmate-patient receiving treatment at the Hospital.

Grievant and Officer X worked an overnight shift in the Room beginning on July 31, 2024. Their shift began at approximately 6:00 p.m. and was scheduled to end at approximately 6:00 a.m. (or when their relief arrived) on August 1, 2024.

Grievant and Officer X also worked an overnight shift in the Room the next night, beginning on August 1, 2024. Their shift began at approximately 6:00 p.m. and was

³ Hearing Recording at 37:52-38:33, 1:31:21-1:32:08 and see Agency Ex. 10.

scheduled to end at approximately 6:00 a.m. (or when their relief arrived) on August 2, 2024.⁴

Grievant testified that he was responsible for making notations in the logbook during the shifts at the Hospital. The logbook included the following entries for the shift that began on the evening of August 1, 2024 and ended during the morning hours of August 2, 2024:⁵

. . . 0006 – Nurse in room for medication
0334 – Nurse in room for medication
0502 – Nurse entered room
0541 – Nurse in the room
0713 – [Grievant] and [Officer X] off post

Grievant testified that he also was responsible for periodically checking in with the Facility by utilizing an application on an Agency-issued cell phone. That application required Grievant to “check-in” approximately every 30 minutes by requiring that Grievant push a button in the app within a specified window of time. Grievant testified that he set a phone alarm to ensure that he did not miss checking-in within the required time frames.⁶ A report from the phone application showed successful check-ins during the shift that began on the evening of August 1, 2024, including the following:⁷

. . . 8/2/2024, 12:25 AM
8/2/2024, 12:55 AM
8/2/2024, 1:25 AM
8/2/2024, 1:55 AM
8/2/2024, 2:25 AM
8/2/2024, 2:55 AM
8/2/2024, 3:25 AM
8/2/2024, 3:55 AM
8/2/2024, 4:25 AM . . .

Hospital Security Officer 1 and Hospital Security Officer 2⁸ worked at the Hospital and were responsible for conducting security rounds at the Hospital. Hospital Security Officer 1 and Hospital Security Officer 2 made security rounds to the Room overnight on July 31 to August 1, 2024, and August 1 to August 2, 2024.

During the hearing, Hospital Security Officer 1 testified that during the early morning hours of August 2, 2024, she observed Grievant sleeping in the Room.

Hospital Security Officer 1 testified that she made a round to the Room with her partner, Hospital Security Officer 2. When they approached the Room, the door was open, and Hospital Security Officer 2 entered the Room first. Hospital Security Officer 2 then

⁴ Hearing Recording at 55:11-57:30.

⁵ Agency Ex. at 26-27.

⁶ Hearing Recording at 22:13-23:27, 25:06-25:54, 1:40:28-1:40:42, 1:50:35-1:52:34.

⁷ Agency Ex. at 34.

⁸ Hospital Security Officer 2 did not testify during the hearing.

asked Hospital Security Officer 1 if she was seeing the same thing as Hospital Security Officer 2. Hospital Security Officer 1 testified that when she then walked into the Room, she observed that both correctional officers in the Room were asleep. Hospital Security Officer 1 observed that Grievant was sitting in a chair with both of his boots off of his feet and was asleep. Hospital Security Officer 1 also observed "both eyes closed" and that Grievant's head was tilted down.⁹ Hospital Security Officer 1 testified that neither Grievant nor Officer X awoke when she and Hospital Security Officer 2 entered the Room. Hospital Security Officer 1 did not speak to Grievant during that round. After Hospital Security Officer 1 and Hospital Security Officer 2 left the Room, they returned to their office and attempted to reach an Agency employee to report their observation that both officers had been asleep. When they could not reach the Agency employee, they contacted their Hospital security supervisor to determine the appropriate next steps.¹⁰

The Hospital security supervisor contacted the Facility's Chief of Security during the morning of August 2, 2024, and reported that Hospital staff had observed the correctional officers on duty in the Room sleeping.

At approximately 9:48 a.m. on August 2, 2024, the Hospital security supervisor provided the Facility's Chief of Security with statements from Hospital staff regarding observations of Grievant and Officer X sleeping while on duty in the Room.

The information provided by Hospital security supervisor included the written statements from Hospital Security Officer 1 setting forth her observations during the overnight shifts on July 31-August 1, 2024, and August 1-August 2, 2024, including the following:

On August 1, 2024, at 0107 security was rounding [a floor of the Hospital] and noticed that the door to [the Room] was wide open, and [Officer X] was sitting by the door asleep. The inmate in the room was sitting on the side of the bed with his feet on the floor. Security knocked on the door and asked if the Officers needed anything, both officers stated that they did not and that they were okay. At 0206 security did another round on [the Room] to have the Officers sign paperwork and found [Officer X] asleep again and the door still wide open. Again, security asked if they needed anything and both officers stated they were okay. At 0346 security received a phone call from the Charge Nurse stating that while she was rounding, she noticed that [Officer X] was asleep. Security came straight up to the floor and walked to the room and the officer was still sleeping. The other CO, [Grievant], was on his phone the entire time. At 0558 security did another round on [the Room] and both officers were wide awake waiting for their reliefs to come.¹¹

On August 2, 2024, at 0050 security rounded on [the Room] and noticed that [Officer X] was in the room sleeping while [Grievant] was eating his dinner. The Inmate was sitting on the side of the bed eating as well. Security

⁹ Hearing Recording at 1:07:31-1:09:22, 1:10:59-1:13:32, 1:16:04-1:19:27.

¹⁰ Hearing Recording at 1:07:31-1:09:22.

¹¹ Agency Ex. at 30.

rounded on [the Room] again at 0232 to get paperwork signed and this time both officers were sleeping, and [Grievant] was sitting in the chair with his boots completely off. At 0414 security rounded on [the Room] again to make sure the officers didn't need anything and found [Officer X] asleep again. It was unsure if [Grievant] still had his shoes off or not. The inmate was still asleep then. At 0605 security did a final rounding on [the Room] and both officers were awake when security entered the room.¹²

The Hospital's security supervisor also provided the Chief of Security with written statements from Hospital Security Officer 2 setting forth her observations on July 31-August 1, 2024, and August 1-August 2, 2024, including the following:

On August 01, 2024, [Hospital Security Officer 1] and I went to check in on the officers that were with [the Room]. The first time checking on them (approximately 0107), the officer closes to the door [Officer X] was asleep in the hard back chair, the door to the room was wide open for anyone to see, and the inmate was sitting on the side of the bed facing door. The second time we checked on the officers (approximately 0206), it was in the same state as the previous time with [Officer X] sleeping again. Later that shift (approximately 0346 the charge nurse for that unit called the security office stating that the officer was again asleep. We both went up to the unit to check on them and to state that the door needs to be at least cracked and not wide open. During all three visits, [Grievant] was on his phone the entire time. The last time we checked on them at this date was approximately 0558 and both officers were awake.¹³

On August 2, 2024, we checked on the officers at approximately 0028. [Officer X] was asleep again and the inmate was again on the side of the bed (with metal restraints) while [Grievant] was eating. The door to the room was closed all the way this time. We checked on both officers again at approximately 0232, where both officers were asleep, along with the inmate and [Grievant] had his boots off. When we checked on the officers at approximately 0413, [Officer X] and the inmate were asleep. After talking with the nursing staff for the unit (after the 0413 visit), they also stated that during their rounds, they have found [Officer X] sleeping a lot. At approximately 0605, both officers were awake with the inmate.¹⁴

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

¹² Agency Ex. at 31.

¹³ Agency Ex. at 29.

¹⁴ Agency Ex. at 30.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”¹⁵

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

Grievant denied sleeping while on duty in the Room at the Hospital. Hospital Security Officer 1 credibly testified, however, that she observed Grievant asleep. Hospital Security Officer 1 testified that she observed Grievant asleep and with both of his boots off of his feet. In describing what she observed when she saw Grievant sleeping, Hospital Security Officer 1 also testified that she observed that “both eyes were closed” and that his head was tilted down. This Hearing Officer found Hospital Security Officer 1’s testimony to be credible and consistent with the written statement she provided on August 2, 2024. Hospital Security Officer 1’s testimony also was consistent with the written statement provided by Hospital Security Officer 2 on August 2, 2024.

Grievant disputed the Hospital security officers’ observations that he had “both” of his boots off. Grievant asserted that he had taken off only one of his boots and that he had done so to fix the boot’s laces. Grievant argued that when the Hospital security officers observed that his boot was off, they assumed that he had taken the boot off to get comfortable and that caused them to incorrectly assume that he was asleep. The Hospital security officers did not just report that they observed that Grievant’s boots were off, but they also reported observing that Grievant was asleep. And neither the written statements, nor Hospital Security Officer 1’s testimony, noted any observation of Grievant adjusting either of his boots or his boot laces or any other observation to suggest that Grievant was otherwise moving. Hospital Security Officer 1 credibly testified that Hospital Security Officer 2 walked into the room first and then asked Hospital Security Officer 1 to confirm what she was seeing. Hospital Security Officer 1 testified that when she then entered the room, she observed Grievant asleep and with both of his boots off. Hospital Security Officer 1 also testified that she observed that “both eyes were closed” and that his head was tilted down.

Grievant asserted that there was not enough time for him to be asleep following his successful check-in on the phone application at 2:25 a.m. and before the Hospital security officers observed him approximately 7 minutes later at 2:32 a.m. That Grievant successfully checked-in at 2:25 a.m. does not refute Hospital Security Officer 1’s credible testimony that she observed Grievant asleep at approximately 2:32 a.m.

Grievant also argued that the Hospital nurses conducted more rounds in the Room than the Hospital security officers and that the nurses did not report observing Grievant sleeping. That the nurses did not report observing Grievant sleeping at the times they were in the Room does not refute the reported observations of the Hospital security officers, including the credible testimony of Hospital Security Officer 1 that they observed Grievant asleep when they made their round in the Room.

¹⁵ See Virginia Department of Corrections Operating Procedure 135.1.

Grievant argued that the evidence was not sufficient to prove that he was asleep as alleged because there was no additional evidence, such as a photograph or video, to corroborate the reports of the hospital security officers. This Hearing Officer does not find Grievant's argument to be persuasive. Even in the absence of a photograph or video of Grievant sleeping, the Agency has presented sufficient evidence to meet its burden of proving by a preponderance of the evidence that Grievant was asleep while on duty at the Hospital. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. Hospital Security Officer 1 provided credible testimony of her observation of Grievant sleeping. Hospital Security Officer 1's testimony was consistent with, and supported by, both the written statement she provided on August 2, 2024 and the written statement Hospital Security Officer 2 provided on August 2, 2024.

The Agency has met its burden of proving by a preponderance of the evidence that Grievant engaged in misconduct by sleeping while he was on duty at the Hospital.

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

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

The Facility's Chief of Security and the Warden testified that when security personnel fall asleep and are not alert or aware of their surroundings while on a transportation security post, it presents the opportunity for an inmate to escape and puts the officers, Hospital staff and patients, and 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. Chief of Security testified that a transportation security post at a hospital is one of the most dangerous posts because of the otherwise unsecure nature of a hospital where the corrections officers have no way of knowing who may enter the room at any time and the officers are armed with guns that could be used against them if they are not sufficiently alert or are somehow overcome by an inmate or other bad actor.¹⁸

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

Grievant appeared, at times, to suggest that the Agency failed to engage in progressive discipline. Grievant argued that he was a good employee with a record of good work performance and no active prior disciplinary actions. Although agencies are encouraged to engage in progressive disciplinary action, agencies are not required to do so. The Agency elected to issue Grievant a Group III Written Notice and has presented sufficient evidence to support its decision.

¹⁶ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.8.

¹⁷ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.A.

¹⁸ Hearing Recording at 28:23-30:59, 39:26-41:05.

Grievant argued that the Agency treated him poorly in the investigation of the allegations against Grievant and did not properly consider the information Grievant provided during the investigation. Grievant also argued that the Agency did not provide him with copies of the witness statements against him until after the Agency made its decision to terminate his employment. Grievant essentially argued that the Agency did not provide him adequate due process. The hearing process cures any such deficiency. Grievant had the opportunity to present any evidence and arguments he wished during the hearing.

Mitigation

Grievant argued that the disciplinary action taken against him was unfair and that the Agency did not appropriately consider his performance record, including the recognition he had received as “employee of the month” in March 2024.

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 argued that it considered mitigating factors, including Grievant's history of good performance evaluations, but because of the serious nature of the offense, the Agency determined that the issuance of a Group III written notice with termination was appropriate in this case.¹⁹

That the Agency could have mitigated the discipline, but determined that it was inappropriate to do so, is not a reason for the Hearing Officer to conclude that the Agency's action exceeds the limits of reasonableness.

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....”²⁰ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹⁹ See Hearing Recording at 37:52-39:59 and Agency Ex. at 1.

²⁰ Va. Code § 2.2-3005.

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.²¹

Angela Jenkins

Angela Jenkins
Hearing Officer

²¹ 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.