



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12186

Hearing Date: December 3, 2024

Decision Issued: January 21, 2025

PROCEDURAL HISTORY

On August 29, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for sleeping while on a security post at a Hospital.¹

On September 13, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 15, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On December 3, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Legal Advocate
Agency Party Designee
Witnesses

ISSUES

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

¹ Agency Ex. at 1-2.

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 Department of Corrections Facility A. Grievant was employed with the Agency for more than 12 years. No evidence of prior active disciplinary action was introduced during the hearing.²

On July 31, 2024, Grievant and Officer X were assigned to a security post in a Room at the Hospital. Grievant and Officer X were responsible for monitoring an Inmate-Patient receiving treatment at the Hospital. The shift that Grievant and Officer X worked was an overnight shift that began on July 30, 2024, at approximately 5:30 p.m. and ended on July 31, 2024, at approximately 8:30 a.m. (or when their relief arrived).³

Lieutenant is employed by the Agency and worked at Facility B. On the morning of July 31, 2024, Lieutenant was assigned to make rounds to the rooms at the Hospital where inmate-patients under the supervision of Facility A and Facility B were being treated.

At approximately 4:31 a.m. on the morning of July 31, 2024, Lieutenant entered the Hospital Room and observed that both Grievant and Officer X were asleep. Lieutenant testified that before entering the Room he knocked on the door two or three times and said, "Good Morning." The Lieutenant recalled that after he entered the Room, he then said something like "Hey" in order to get the officers' attention, but the officers still did not respond to him. The Lieutenant testified that he then walked back to the door and knocked again and again said "Good Morning." According to the Lieutenant, it was at that point that Officer X first raised her head and spoke to him. Lieutenant testified that it was a few

² Hearing Recording 1:08:32-1:09:13 and Agency Ex. at 3.

³ Hearing Recording at 1:05:12-1:06:05, 1:09:13-1:10:10.

seconds later when Grievant then raised his head. Lieutenant described that Grievant “woke up startled” and as though he had been “surprised.”⁴

After he exited the Room, Lieutenant called the Watch Commander for Facility A and reported his observations of Grievant and Officer X sleeping in the Room.⁵ The Watch Commander requested that the Lieutenant send an email to report his observations. At 4:41 a.m. that same morning, Lieutenant sent an email to the Watch Commander at Facility A. Lieutenant wrote:

While conducting a round on [Inmate-Patient] this morning at 0431 I walked in [the Room], said good morning, and found both officers to be sleep.⁶

The Watch Commander replied to the Lieutenant’s email and requested that he provide more detail of his observations.⁷

At approximately 5:15 a.m., the Lieutenant sent another email to the Watch Commander as requested. The Lieutenant wrote the following:

While conducting a round on [Inmate-Patient] this morning at 0431 I walked in [the Room], said good morning, and found both officers to be sleep. Both officers were sitting on the far side of the room with all the lights off in the room. I stood there for about 30 seconds without either officer noticing my presence. I said good morning a second time a bit louder and after a few seconds the female officer woke up and began speaking to me. The male officer woke up a few seconds later.⁸

The Lieutenant also reported his observations of the officers sleeping in the Room to a Major at Facility B.⁹

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.”¹⁰

⁴ Hearing Recording at 18:44-22:05, 23:47-24:17, 28:27-29:29, 37:25-37:44.

⁵ Hearing Recording at 20:29-22:05.

⁶ Agency Ex. at 10.

⁷ Agency Ex. at 10.

⁸ Agency Ex. at 9.

⁹ Agency Ex. at 11.

¹⁰ See Virginia Department of Corrections Operating Procedure 135.1.

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

When Grievant was asleep while on duty in the Hospital Room, Grievant was not alert and was not observing the Inmate-Patient. Sleeping while on duty is misconduct. Grievant was expected to report for duty in the mental and physical condition to perform the duties of his post. The post that Grievant was working on July 31, 2024, required that he maintain constant sight supervision of the Inmate-Patient. If Grievant was unable to perform his duties because he was ill, had insufficient rest, or was feeling sleepy, he was expected to notify Facility A so that relief could be provided without compromising security.¹¹

Grievant denied sleeping while on duty in the Hospital Room and testified that he saw the Lieutenant when the Lieutenant entered the Hospital Room. Grievant asserted that at the time he saw the Lieutenant "walking up," Grievant was thinking and praying. Grievant testified that he was awake, but that his mind may have been in another place.¹² Grievant also asserted that there was a lot of noise in the Room from the Hospital bed and a television. Grievant appeared to suggest that the noise may have affected how quickly he noticed the Lieutenant. During the hearing, the Lieutenant credibly testified that he observed Grievant sleeping. Lieutenant testified that when he entered the Room, he observed that Grievant's head was down. Lieutenant did not just "walk up," he knocked on the door and said "Good Morning" as he entered the Room and then after observing no response from the officers, he knocked on the door and said "Good Morning" a second time with no response from Grievant. After the second time that Lieutenant knocked on the door and again said "Good Morning," Officer X raised her head and began speaking with Lieutenant. It was a few seconds later that Grievant raised his head and Lieutenant observed that Grievant "woke up startled" as if "surprised."¹³

Grievant argued that the evidence was not sufficient to prove that he was asleep because there was no physical evidence, such as a photograph or video, to corroborate Lieutenant's observations. 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. Lieutenant provided credible testimony of his observations of Grievant sleeping. Lieutenant's recollection was clear, and his testimony was consistent with the written information he provided to the Agency on July 31, 2024.

Grievant pointed out that the Inmate-Patient's hands and legs were cuffed and a restraint attached to the Inmate-Patient's waist was attached to the Hospital bed. Grievant also noted that the Inmate-Patient had a tube down his throat. To the extent Grievant may have suggested that this Inmate-Patient could not escape such that the Agency's concerns were overblown, this Hearing Officer is not persuaded. Grievant and Officer X

¹¹ Hearing Recording at 24:13-27:30, 51:10-52:58 and see Agency Ex. at 14-24.

¹² Hearing Recording at 1:01:47-1:02:53.

¹³ Hearing Recording at 18:44-22:05, 23:47-24:17, 28:27-29:29, 37:25-37:44.

were armed with weapons and the post they were working required that they remain alert and vigilant, not just to the activities of the Inmate-Patient, but also to the identification and activities of persons entering the Hospital Room.¹⁴

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.¹⁵ Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.¹⁶

The Warden testified that when security personnel fall asleep and are not alert or aware of their surroundings while on a Hospital security post, it presents the opportunity for an inmate to escape and puts the public at risk.¹⁷

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

Mitigation

Grievant asserted that he was a good employee with more than 12 years of service who had come in to work on the security post at the Hospital on his day off in order to help the Agency because of a staffing shortage at Facility A.¹⁸ Grievant argued that staff are required to remain on post until relieved from duty and that staffing at Facility A is sufficiently low that staff could be required to work a shift for as long as 24 hours (or longer).¹⁹

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 years of service and performance, 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.²⁰

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. Although Grievant's assertions

¹⁴ Hearing Recording at 28:37-29:29, 32:57-33:57 and see Agency Ex. at 14-24.

¹⁵ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.8.

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

¹⁷ Hearing Recording at 42:35-45:31, 48:22-48:56.

¹⁸ Hearing Recording at 1:00:37-1:01:03.

¹⁹ Hearing Recording at 53:45-54:48.

²⁰ See Hearing Recording at 48:22-48:56, 50:06-50:41 and Agency Ex. at 3.

that correctional officers may work 24-hour shifts (or longer) was concerning, there was no evidence to suggest that Grievant had been working such a long shift when the Lieutenant observed him sleeping. The testimony during the hearing was that Grievant's shift began at approximately 5:30 p.m. on July 30, 2024, and Lieutenant observed Grievant at approximately 4:31 a.m. on July 31, 2024, or approximately 11 hours into his shift which ended at approximately 8:30 a.m. Although the evidence indicated that Grievant worked a long shift, it was reasonable for the Agency to expect that Grievant would remain awake and alert while he was on duty at the Hospital, or that he would advise the Agency if he could not remain awake and alert.

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...."²¹ 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.

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.

²¹ Va. Code § 2.2-3005.

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.²²

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

²² 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.