

IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE  
OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NUMBER 12198

DECISION OF HEARING OFFICER

The Virginia Department of Conservation and Recreation (the Agency) terminated the Grievant from employment on October 9, 2024, for multiple instances of sleeping on duty. The Grievant has challenged the actions of the Agency pursuant to his rights as an employee of the Commonwealth of Virginia. After hearing the evidence presented by the Agency at a due process hearing, I uphold the actions of the Agency.

I. PROCEDURAL BACKGROUND

Grievant filed his “Grievance Form A-Dismissal Grievance” on October 21, 2024. He challenged the issuance of a Group II Written Notice and termination of employment on October 9, 2024. Pursuant to applicable policy, the matter was automatically qualified for a hearing.

I was appointed by the Office of Employment Dispute Resolution as Hearing Officer, effective as of November 4, 2024. I conducted a Pre-Hearing Conference on November 12, 2024. It was attended by an Agency Lay Advocate, Agency Representative, and the Grievant. The parties mutually agreed to a hearing date of December 18, 2024.

I entered a Prehearing Order setting forth the responsibilities of the parties prior to the hearing. In accordance with that Order, the Agency submitted eight (8) exhibits and designated possible witnesses. The Grievant submitted no exhibits and listed no possible witnesses. The hearing was conducted as scheduled on December 18, 2024, at a location in the general vicinity of the subject’s work site. The hearing lasted approximately one (1) hour.

II. APPEARANCES

At the hearing, the Agency was represented by a lay advocate. No additional representative attended the hearing on behalf of the Agency. The Agency presented two (2) witnesses, each of whom testified in-person. The eight (8) exhibits provided at, and before, the hearing were accepted into evidence without objection.

The Grievant represented himself. He provided opening and closing statements, and testimony, and was given the opportunity to cross-examine the Agency’s witnesses. The Grievant called no other witnesses on his behalf, and did not seek to introduce any exhibits. He confirmed

during the hearing that he was challenging only the Group II Written Notice given on October 9, 2024.

### III. ISSUE

Whether the Agency acted properly in issuing the Grievant owed Group II Written Notice on October 9, and terminating him from employment on that same date?

### IV. FINDINGS OF FACT

Grievant worked for the Agency for approximately six (6) years leading up to the late summer and early fall of 2024. His work performance had been at least satisfactory for the majority of his time of employment. The performance began to change in July 2024.

On October 2, the Agency issued the Grievant two separate Written Notices. One was a Group II for alleged unsafe driving practices in Agency vehicles on multiple occasions and at various locations. The second was a Group I for sleeping while on duty. The Grievant did not challenge the issuance of those disciplinary actions, and each remained active on October 9, 2024.

While the Agency investigated the basis for these Written Notices and the Grievant being afforded his rights under the Virginia laws and policies, other employees observed the Grievant sleeping while at work on three (3) separate occasions. On September 24, 2024, the Park Manager personally observed Grievant asleep in an Agency vehicle being driven by another employee. The Grievant attempted to explain that his head was hanging out an open window because he was just cooling off.

Two (2) days later, on September 26, a co-worker observed the Grievant nodding off while working at a computer. The very next day, September 27, he was observed and photographed sleeping in a break area on the work site.

After these events, the Agency issued a second Due Process Memorandum to the Grievant. He did not deny the allegations as to the September 26 and September 27 events. He explained that he had been having significant personal issues causing him to lose sleep. He further explained that he had been taking one or more medications that contributed to his drowsiness. The Agency issued the subject disciplinary action on October 9 and terminated the employment of Grievant.

### V. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal

disciplinary actions. The Department of Human Resource Management, Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice?
- II. Whether the behavior constituted misconduct?
- III. Whether the discipline was consistent with policy? and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

With credible candor, Grievant admitted the Agency's evidence accurately described what happened on September 24, 26, and 27. The Agency relies on Policy 1.60 of the Department of Human Resource Management in its disciplining the Grievant. That policy is commonly known as the "Standards of Conduct." In the October 9 Written Notice, the Agency cites the Grievant for the abuse of State time and sleeping during work hours. The Standards of Conduct do not contain a definition of "abuse of State time." It also does not directly and explicitly address sleeping during work hours. A policy does, however, prohibit an employee from the "neglect of duty." That standard includes "negligent actions in attending to or failing to perform job duties." Therefore, I find the Grievant did violate Policy 1.60.

I have examined that policy to determine whether the Agency properly classified the neglect by the Grievant as constituting a Group II offense. The policy sets forth distinct levels of punishment for improper or inadequate performance by Commonwealth employees. The level of offense primarily depends on the nature of it. Group I offenses are those that "generally have a minor impact on Agency business operations but still require intervention." The policy lists abuse of State time as an example of a Group I offense. Group II offenses are those actions or omissions of a "more serious nature that significantly impacts the Agency's services and operations." Section 5.8 of the Grievance Procedure Manual dictates that a Hearing Officer shall give due difference to the decision of an Agency in assessing the seriousness of an offense, provided that the Agency has acted within reason.

None of the late September events can reasonably be characterized as having a significant impact on the Agency's operations. Individually, they each would reasonably be a Group I level offense. The evidence does not show that the Grievant was asleep for an extended amount of time. Aside from the disruptions caused by the Agency having to pursue discipline against the Grievant, the impact on the operation appears to have been slight. The Agency provided testimony as to the

impact of the firing of Grievant on operations; that is not the type of impact contemplated by the policy. The evidence also does not show that any of these events constituted a safety risk to the public or other employees.

The Agency made the decision to combine the three (3) events into a single Written Notice. The pattern of misconduct by the Grievant makes this combination reasonable. The grouping of the offenses together also justifies the issuance of the higher level of discipline, being the Group 2 offense. The Standards of Conduct allow an employee to be terminated for a Group 2 level offense if an employee has an accumulation of active written disciplines. The Grievant received both a Group I, and a separate Group II discipline on October 2, 2024; both remained active on October 9. The issuance of this second Group 2 Written Notice allowed the Agency to terminate the Grievant from employment. This was within the Agency's discretion and is reviewed by me only for reasonableness. Although it was not the only possible reasonable outcome, it fell within the bounds of reasonableness.

The Agency considered the work history of the Grievant and chose not to issue lesser discipline. I accept the explanation of Grievant, that he was dealing with issues not related to his work that caused him to lose sleep. Although understandable, these issues cannot justify further mitigation of the level of discipline. Additionally, he did not provide as part of his testimony what medical conditions for which he was taking medication, or the names of those medications. Whether any of these issues would have supported a claim of a violation of Americans With Disabilities Act is solely a matter of conjecture. Speculation is something I cannot do.

## VI. DECISION

This case is one in which an employee's non-work, non-related issues carried over to the workplace and affected his performance. That is unfortunate, both for the employee and the Commonwealth. For reasons given above, I uphold the issuance of the Group II Written Notice on October 9, 2024, and the termination of the Grievant from employment.

## VII. APPEAL RIGHTS

The parties may file an administrative review request within fifteen (15) calendar days from the date this decision is issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management  
101 North 14th Street, 12th Floor  
Richmond, Virginia 23219

or send them by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14th Street, 12th Floor  
Richmond, Virginia 23219

or send by email to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by facsimile to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within fifteen (15) calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within thirty (30) days of the date when the decision becomes final.

[See Sections 7.1 through 7/3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant.]

ORDERED this 12<sup>th</sup> day of January, 2025.

Thomas P. Walk, Hearing Officer