



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12178

Hearing Date: February 4, 2025

Decision Issued: March 17, 2025

PROCEDURAL HISTORY

On August 30, 2024, Grievant was issued a Group III Written Notice of disciplinary action with termination for sleeping while on a security post at a Hospital. The Written Notice indicated that Grievant's termination was effective August 29, 2024.¹

On September 5, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 30, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. A hearing of the matter was originally scheduled to occur on November 25, 2024. On November 14, 2024, the Grievant's advocate requested that the hearing be continued due to illness. The Agency did not object to the request for continuance and the Hearing Officer granted the continuance. The hearing was rescheduled for February 4, 2025.

On February 4, 2025, a hearing was held at the Facility.

APPEARANCES

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

¹ Agency Ex. at 1-2.

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 an Agency Facility. Grievant was employed with the Agency for more than three years. No evidence of prior active disciplinary action was introduced during the hearing.²

On July 31, 2024, Grievant and Officer-1 were assigned to a security post in a Room at the Hospital. Grievant and Officer-1 were responsible for monitoring an Inmate-Patient receiving treatment at the Hospital. The shift that Grievant and Officer-1 worked, was an overnight shift that began on July 30, 2024, at approximately 6:00 p.m. and ended on July 31, 2024, at approximately 6:00 a.m. (or when their relief arrived).³

At approximately 4:30 a.m., Grievant was sitting in a chair in the Room from where she could see the Inmate-Patient and his movements. Grievant was talking to herself in an effort to calm her heart rate. According to Grievant, sometimes, after she has consumed a lot of coffee, she talks to herself to calm her heart rate.⁴ Grievant did not immediately notice when the Lieutenant entered through the door of the Room because the door to the Room was "quiet." Grievant testified that she noticed the Lieutenant a few

² See Agency Ex. at 7, Hearing Recording 49:20-49:51.

³ Hearing Recording at 28:10-29:48, 38:13-38:47.

⁴ Hearing Recording at 43:52-45:13.

seconds after he had entered the Room. Because she was responsible for updating the logbook, she turned her attention to entering information into the logbook. Grievant entered information into the logbook and then handed the logbook to the Lieutenant to sign. The Lieutenant asked Grievant for the time and Grievant told him the time. After he finished with the logbook, the Lieutenant exited the Room.⁵

At approximately 4:41 a.m., the Lieutenant sent an email to the Facility's Watch Commander. The 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 The Watch Commander testified that he made the request so that the Lieutenant would provide more information as to what the Lieutenant had observed the officers doing that led to his statement that the officers were asleep, for example, whether they were leaned back in a chair, had their heads down, or were snoring.⁸

At approximately 5:15 a.m., the Lieutenant sent another email to the Watch Commander. 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.⁹

The Watch Commander forwarded the information he received from the Lieutenant to the Former Major who then forwarded the information to the Warden and others.¹⁰

The Agency did not relieve Grievant from her duties prior to the end of her shift.¹¹

CONCLUSIONS OF POLICY

The responsibility of the Hearing Officer is to determine whether the Agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the Hearing Officer reviews the

⁵ Hearing Recording at 37:20-41:52, 42:19-46:18, 50:07-51:11.

⁶ Agency Ex. at 12.

⁷ Agency Ex. at 11-12.

⁸ Hearing Recording at 6:22-7:56, 9:27-11:20.

⁹ Agency Ex. at 11.

¹⁰ Agency Ex. at 11-12, Hearing Recording at 7:57-8:33.

¹¹ Hearing Recording at 37:20-41:52, 42:19-46:18, 50:07-51:11.

evidence *de novo* (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

Sleeping during working hours is a Group III offense.¹² Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination.¹³

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

The Agency has not met its burden of proving by a preponderance of the evidence that Grievant was sleeping while she was on duty at the Hospital.

Grievant denied that she was sleeping while on duty at the Hospital. Grievant testified that she did not hear the Lieutenant when he came through the door because the door to the Room was “quiet,” but according to Grievant she noticed him within a few seconds of him entering the Room. Grievant appeared to admit that she did not acknowledge or say, “good morning” to the Lieutenant when he said, “good morning.” Grievant asserted that she heard the Lieutenant say, “good morning”, but she focused her attention on updating the logbook. Grievant also disputed the Lieutenant’s observation that the lights in the Room were turned off. Grievant testified that there was light from a television in the Room and there was a light on above the door, which Grievant asserted was consistent with information she had been provided by an assistant warden about acceptable lighting for a hospital room. According to Grievant, after the Lieutenant signed the logbook, he exited the Room without providing any indication to her that he believed she had been asleep.¹⁴

The two emails sent by the Lieutenant to the Watch Commander on the morning of July 31, 2024, were the only evidence offered as proof that Grievant was sleeping while on duty at the Hospital that morning. In those emails the Lieutenant made clear his conclusion that Grievant and Officer-1 were asleep in the Hospital Room that morning, but those emails provided no information as to how the Lieutenant reached such a conclusion. At most, the emails indicate that the Lieutenant may have concluded that Grievant was asleep because she did not respond by speaking to him after he said, “good morning.” The Lieutenant also did not provide any other information as to what led him to conclude that Grievant “woke up.” If the Lieutenant made other observations of Grievant’s behavior that supported his conclusion that she was asleep, he did not include those observations in his emails to the Watch Commander. Based on their testimony, neither the Warden¹⁵ nor the Watch Commander¹⁶ received any additional information from the Lieutenant regarding the observations he made on July 31, 2024, that would support his

¹² See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.B.8.

¹³ See Virginia Department of Corrections Operating Procedure 135.1., Procedure XIV.A.

¹⁴ Hearing Recording at 37:20-41:52, 42:19-46:18, 50:07-51:11.

¹⁵ Hearing Recording at 26:30-26:52.

¹⁶ Hearing Recording at 6:00-11:20.

conclusion that Grievant was asleep. Because the Lieutenant did not testify during the hearing and no additional information regarding his observations was provided, this Hearing Officer is unable to determine the reliability of, or basis for, the Lieutenant's conclusion that Grievant was "asleep" and then "woke up."

Based on the evidence provided, the Agency has not met its burden of proving by a preponderance of the evidence that Grievant was asleep while on duty at the Hospital.

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

Because the Agency has not met its burden of proving that Grievant engaged in misconduct, the Agency's discipline was not consistent with law and policy.

Mitigation

Because the Agency has not met its burden of proof, there is no need to consider mitigating or aggravating factors with respect to the discipline issued.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group III Written Notice of disciplinary action with termination is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if that position is filled, to an equivalent position. The Agency is directed to provide **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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.